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In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 41.

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 427, A. F. L., *et al.*,

Petitioners,

vs.

FAIRLAWN MEATS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF OF RESPONDENT.

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TABLE OF CONTENTS.

Questions Presented 1

Statement of the Facts 2

A. The Pleadings and the Trials 2

B. The Parties 6

Plaintiff-Respondent 6

The Defendants-Petitioners 8

C. Plaintiff's Relation With Its Employees 9

D. The Conduct of the Defendants-Petitioners 12

Summary of Argument 16

Argument:

Jurisdiction of the State Court 21

This Court Has Never Directly Decided This Issue, But In Several Cases Has Indicated That State Jurisdiction Could Properly Be Exercised to Provide Due Process of Law 31

Assuming That the Instant Controversy Affects Commerce Within the Meaning of the National Labor Relations Act, Since the National Labor Relations Board Would Decline to Exercise Jurisdiction Here, the State Court Correctly Concluded That It Had Jurisdiction of the Case 35

A. The Case Here Is One that Does Not Fall Within the Board's Announced Jurisdictional Standard, and the Board Would Therefore Decline Jurisdiction 36

B. Since the Board Would Decline Jurisdiction Herein the State Court Had Jurisdiction to Decide the Issues 39

1. Under Settled Principles, No Basis Exists for Implying the Exclusion of State Power 40

2. The Principle Underlying the Exclusion of State Power Is In Conflict With Federal Authority and No Possibility of Such Conflict Exists Where the National Board Declines Jurisdiction Altogether 43

3. The Action of the State Court Here Was Consistent With Federal Policy as Set Forth in the National Act 46

4. The Decided Cases Show that the State Court Had Jurisdiction to Proceed Here 49

a. Court Decisions 49

b. State Labor Board Decisions 54

5. If State Court Jurisdiction is Barred Under the Circumstances of This Case the Necessary Effect Is to Compel the National Board to Abandon Its Jurisdictional Standards and Accept Jurisdiction in All Cases Covered by the National Labor Relations Act Regardless of How Minor the Impact on Interstate Commerce. The Result of This Would Be to Cause a Frustration of the Proper Administration of the National Labor Relations Act 56

6. Erroneous Arguments of Petitioners 59

Petitioners Propose an Unconstitutional Interpretation of the Act Contrary to the Decisions of This Court and Completely Fail to Justify the Denial of Due Process That Would Result 75

Conclusion 78

APPENDICES:

A. N. L. R. B. Jurisdictional Standards—1950 ... 79

B. N. L. R. B. Jurisdictional Standards—1954 ... 81

TABLE OF AUTHORITIES.

Cases.

Adams Dairy v. Dairy Employees Union (Mo.), 38 LRRM 2404 ... 45

Aetna Freight Lines v. Clayton, 228 F. (2d) 384 (C. C. A. 2) ... 45

Aladdin Industries v. Associated Transport (Tenn. App), 38 LRRM 2599 ... 42, 46

Algoma P. & V. Co. v. W. E. R. B., 336 U. S. 301, 93 L. Ed. 691, 69 S. Ct. 584 ... 31, 32-33, 34, 65

Allen Bradley Local v. Wisconsin Employment Relations Board, 315 U. S. 740 ... 17, 40, 41, 55

All Hotel Members of Miami Beach Hotel Association, 36 LRRM 1447 ... 61

Amalgamated Ass'n. etc. v. Wisconsin Employment Relations Board, 340 U. S. 383 ... 74

Amalgamated Clothing Workers v. Richman Bros., 348 U. S. 511, 99 L. Ed. 600, 75 S. Ct. 452 ... 16, 31, 77-78

Amazon Cotton Mills Co. v. Textile Workers Union, 167 F. (2d) 183 (C. C. A. 4) ... 45, 59

Anderson v. Retail Clerks Local No. 698, 30 Labor Cases ¶ 70158 ... 48

Armour v. Wantock, 323 U. S. 126 ... 73

Ashland Motor Co., 37 LRRM 1116 ... 54

Bellaire v. B. & W. Ferry Co., 105 O. S. 247 ... 28

Benz v. Compania Naviera Hidalgo, 233 F. (2d) 62 (C. C. A. 9) ---- 42

Bethlehem Steel Co. v. N. Y. S. L. R. B., 330 U. S. 767, 91 L. Ed. 1234, 67 S. Ct., 1026 ---- 17, 19, 20, 31, 33, 40, 41, 42, 43, 54, 65, 66

Blanche v. New York Central Railroad Company, 103 O. S. 471 ---- 28

Born v. Laube, 213 F. (2d) 407, *reh'g. den.* 214 F. (2d) 349 (C. C. A. 9), *cert. den.* 348 U. S. 855, *reh'g. den.* 348 U. S. 932 ---- 45

Breeding Transfer Company, 110 NLRB 493, 35 LRRM 1020 ---- 17, 37, 42, 63, 65

Brooks v. N. L. R. B., 348 U. S. 96 ---- 39, 57

Building Service Employees International Union v. Gazzam, 339 U. S. 532 ---- 18, 48

Building Trades Council v. Kinard, 346 U. S. 933, 98 L. Ed. 423 ---- 16, 33, 35, 37

Building Trades Council of Reno v. Bonito (Nev.), 280 P. (2d) 295, 35 LRRM 2600 ---- 51

Cain, Brogden & Cain v. Teamsters (Tex.), 285 S. W. (2) 942, 37 LRRM 2298 ---- 51

Capital Service v. National Labor Relations Board, 204 F. (2d) 848 (C. C. A. 9) ---- 53-54

Cavett v. Machinists, District Lodge 34, 30 Labor Cases ¶ 70161 ---- 48, 49

East Newark Realty Corp., 115 NLRB No. 75, 37 LRRM 1328 ---- 61

Garmon v. San Diego Building Trades Council (Calif.), 291 P. (2d) 1, 37 LRRM 2233, *cert. granted* 351 U. S. 923 ---- 45, 51

Garner v. Teamsters, 346 U. S. 485, 98 L. Ed. 228, 74 S. Ct. 161 ---- 17, 18, 31, 33, 35, 41, 43, 45, 48, 51

Graybar Electric Co. v. Automotive Union (Mo.), 287 S. W. (2d) 794, 37 LRRM 2556 53

Grimes & Hauer, Inc. v. Pollock, 163 Ohio State 372 6

Guss v. Utah Board (Utah Sup. Ct.), 296 P. (2d) 733, 38 LRRM 2137 ..... 18, 45, 49, 54

Haleston Drug Stores v. NLRB, 187 F. (2d) 418 (C. C. A. 9), cert. den. 342 U. S. 815 ..... 20, 57, 62, 64

Hammer v. Textile Workers (N. J. Superior Ct.), 111 A. (2d) 308, 34 LRRM 2812 51

Hilton Hotels, 37 LRRM 1474 ..... 54, 55

Hogue & Knott Supermarkets, 110 N. L. R. B. 543, 35 LRRM 1060 ..... 38, 39

Hollow Tree Lumber Company, 91 NLRB 635, 26 LRRM 1543 36

Hotel Association of St. Louis, 92 NLRB 1388, 27 LRRM 1243 61

Ideal Soap and Chemical Co., 38 LRRM 1043 54

International Union v. Underwood Corp., 219 F. (2d) 99 (C. C. A. 2) 45

International Union v. Wisconsin Board, 336 U. S. 245, 93 L. Ed. 651, 69 S. Ct. 516 ..... 31, 32, 34, 40, 41, 43, 55

Interstate Overall Service Inc., 37 LRRM 1431 54

Jackson v. Irving Trust Co., 311 U. S. 50 25

Lee Mark Metal Manufacturing Co. v. Local 596 (Pa. Ct. Common Pleas, Phila. County), 38 LRRM 2219 51

Machinists Union v. Goff-McNair Motor Co. (Ark.), 264 S. W. (2d) 48, 33 LRRM 2641 46

Milwaukee Store Company v. Hosiery Workers (Wisc.), 69 N. W. (2d) 762, 35 LRRM 2757 46

Minor v. Building Trades Council (N. Dak.), 75 N. W. (2d) 139, 37 LRRM 2644 45

National Labor Relations Board versus The Babcock & Wilcox Co.; National Labor Relations Board versus Seam Prufe, Inc., and *Ranco, Inc., versus National Labor Relations Board*, 76 Sup. Ct. 679 22

New York Board v. Wags Transportation System, 130 N. Y. S. (2d) 731, 33 LRRM 2855, 284 App. Div. 883, 134 N. Y. S. (2d) 603 ---------- 53

NLRB v. Denver Building and Construction Trades Council, 341 U. S. 675 ---------- 17, 36, 37, 56

N. L. R. B. v. Indiana and M. Electric Co., 318 U. S. 9 ---------- 56, 60, 74

N. L. R. B. v. Swift, 130 F. Supp. 214 (E. D. Mo.), *aff'd. on other grounds* 233 F. (2d) 226 (C. C. A. 8) ---------- 45, 52

Operating Engineers, 38 LRRM 1431 ---------- 54

Optical Workers Union v. N. L. R. B., 227 F. (2d) 687 (C. C. A. 5), *reh'g. den.* 229 F. (2d) 170, *cert. den.* 351 U. S. 963 ---------- 57, 63

Progressive Mine Workers v. N. L. R. B., 189 F. (2d) 1 (C. C. A. 7), *cert. den.* 342 U. S. 868 ---------- 57

Raisch Motors, 35 LRRM 1631 ---------- 53, 54

Retail Clerks Local No. 1564 v. Your Food Stores, 225 F. (2d) 659 (C. C. A. 10) ---------- 52

Ringling Bros. v. Lewis (N. Y. Sup. Ct.), 37 LRRM 2810 ---------- 51

School District v. Trades Council (Cir. Ct., Ottawa County, Mich.), 37 LRRM 2232 ---------- 52, 53

Spielberg Mfg. Co., 112 NLRB 1080, 36 LRRM 1152 58

Spohn v. Industrial Commission, 138 O. S. 42 ---------- 28

State v. Cleveland & P. R. Company, 94 O. S. 61 ---------- 28

State ex rel. Simpson v. Pennsylvania Co., 85 O. S. 540 28

Stoll v. Gottlieb, 305 U. S. 165 ---------- 25

Teamsters Local No. 25 v. N. Y., New Haven & H. R. Co., 350 U. S. 155 ---- 47

Teamsters Local v. Merchandise Co. (Ind. App.), 132 N. E. (2d) 715, 37 LRRM 2819 ---- 51

Texas R. Co. v. Gulf Refining Co., 270 U. S. 266; 46 Sup. Ct. 263 ---- 16, 24-25

U. A. W. v. W. E. R. B., ---- U. S. ----, 100 L. Ed. 666 31

U. A. W. v. Wisconsin Employment Relations Board, 351 U. S. 266 ---- 40, 41, 44, 59, 69

U. E. v. Worthington Corp., 38 LRRM 2507 (C. C. A. 1) ---- 44, 45, 58

United Constr. Wkrs. v. Laburnum, 347 U. S. 656, 98 L. Ed. 1025, 74 S. Ct. 833 ---- 17, 31, 34, 36, 37, 39, 40, 42, 43-44, 58, 63, 66, 69

United Mine Workers v. Arkansas Oak Flooring Co., 351 U. S. 62 ---- 20, 72, 73, 74

Universal Car Company v. Machinists, 35 LRRM 2087 53

Walker Motors, 36 LRRM 1290 ---- 54

Weber v. Anheuser-Busch, 348 U. S. 468, 99 L. Ed. 546, 75 S. Ct. 480 ---- 17, 31, 40, 41, 44, 45, 47, 51

Wong Yang Sung v. McGrath, 339 U. S. 33 ---- 20, 70, 72

Constitution.

Constitution of the United States:

Article I, Section 8, Clause 3 ---- 27

Tenth Amendment ---- 23

Statutes.

Labor Management Act:

Sec. 301 ---- 74

Sec. 303 ---- 74

National Labor Relations Act, 61 Stat. 136, 29 U. S. C. Supp. V, 151 *et seq.* 35
Sec. 1 66
Sec. 7 ..... 20, 73
Sec. 8(a)(3) 48
Sec. 8(b)(2) 18, 48, 49
Sec. 8(b)(4)(A) and (B) 49
Sec. 9(f), (g) and (h) 21, 73
Sec. 10(a) 19, 20, 52, 59, 60, 61, 63, 64, 65, 66, 68, 69, 71, 72, 76
Sec. 10(b) 60, 74
Sec. 10(j)(l) 59
Sec. 14(a) 74, 75
Sec. 208 59
Sec. 303 59

Public Law 189, 82nd Cong., 1st Sess., Ch. 534, approved October 22, 1951, 65 Stat. 601 72

U. S. C. A. Title 29, Sec. 141 27

U. S. C. A. Title 29, Sec. 142 27

Wagner Act 26, 27

Reports and Publications.

1 CCH Labor Law Reporter ¶ 1610, pp. 1613-1617 39

93 Cong. Rec. 6540 20

95 Cong. Rec. 8717 71

100 Cong. Rec. 6203 71

Hearings before Joint Committee on Labor Management Relations, 80th Cong., 2nd Sess., pp. 1121, 1155-1156, 1157-1165 63-64

Hearings before Senate Committee on Labor and Public Welfare on S. 249, 81st Cong., 1st Sess., pp. 175, 176, 177 64

Hearings on S. 225 et al., 83rd Cong., 1st Sess. 71

Hearings on S. 249, 81st Cong., 1st Sess. 70

Hearings pursuant to H. Res. 115, 83rd Cong., 1st Sess. 71

H. Rept. 317, 81st Cong., 1st Sess., 95 Cong. Rec. 3146 71

H. Rept. 510, 80th Cong., 1st Sess., p. 52 ..... 59, 66

H. Rept. 1852, 81st Cong., 2nd Sess., p. 10 64

H. R. 2032, 81st Cong., 1st Sess. 71

Isaacson, Federal versus State Jurisdiction, 42 A. B. A. J. 415, 484 55-56

Legislative History of the Labor-Management Relations Act, 1947:

Pages 412, 500 65

Page 432 66

Page 556 ..... 59, 66

Page 883 69

N. L. R. B. 16th Annual Report (1952), pp. 15-39, 256-257 64

Report of Joint Committee on Labor Management Relations, S. Rept. 968, 80th Cong., 2nd Sess., Part 3, pp. 11-13 64

S. 2650, 83rd Cong., 2nd Sess. 71

S. Rept. 99, 81st Cong., 1st Sess., Parts 1 and 2 70-71

S. Rept. 99, 81st Cong., 1st Sess., Part 2 71

S. Rept. 99, 81st Cong., 1st Sess., Part 2, p. 75 71

S. Rept. 99, 81st Cong., 1st Sess., Part 1, p. 40 64

S. Rept. 105, 80th Cong., 1st Sess., Part 1, p. 6 and Part 2, p. 38 65

S. Rept. 105, 80th Cong., 1st Sess., Part 1, p. 26 66

S. Rept. No. 986, 80th Cong., 2nd Sess., Part 1, pp. 30-31 70

S. Rept. No. 986, 80th Cong., 2nd Sess., Part 3, pp. 14-15 70

S. Rept. 1211, 83rd Cong., 2nd Sess., pp. 28, 33 71

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Petitioners,

vs.

FAIRLAWN MEATS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF OF RESPONDENT.

QUESTIONS PRESENTED.

1. This case presents the question whether or not a State Court may determine the question of fact as to whether the plaintiff, seeking injunction against the violation of the State's public policy, is engaged in business or conduct, which affects interstate commerce; and

2. May a State Court proceed to try an issue as to the violation of the State's public policy in a case in which the business of the plaintiff falls below the jurisdictional standards of the National Labor Relations Board? and

3. May a State Court enjoin continuous trespass by a Union, which does not represent a majority of the employees, and its officers, who are not employees of the plaintiff, where the State Court finds as a fact that the employer does not affect interstate commerce and where the employer's business falls below the jurisdictional standards of the National Labor Relations Board?

STATEMENT OF THE FACTS.

Under this heading, we shall deal with

A. The Pleadings and the Trials.

B. The Parties.

C. The Plaintiff's Relationship with Its Employees.

D. The Conduct of the Defendants.

A. THE PLEADINGS AND THE TRIALS.

Fairlawn Meats, Inc., filed a petition in the Common Pleas Court of Summit County, Ohio on the eighth (8th) day of February, 1954, seeking an injunction and restraining order against all unlawful acts and interference with the operation of the plaintiff's business (R. 1-4).

On the 11th day of February, 1954, the Common Pleas Court entered a temporary restraining order (R. 5).

On the 26th day of February, 1954, the defendants, Amalgamated Meat Cutters and Butcher Workmen of North America Local No. 427, A. F. L., Sam Pollock, its President and James Dougherty, its Business Agent, removed the proceeding to the United States District Court for the Northern District of Ohio, Eastern Division. On the plaintiff's motion to remand the case to the State, after full and complete argument by Union counsel on the question of jurisdiction, Judge McNamee remanded the case to the State Court on the grounds that the petition did not state a federal question and there were no allegations in the petition from which a federal question might be inferred.

On March 26, 1954, the defendants filed its amended answer, asking that the petition be dismissed and the temporary restraining order vacated on the ground that the defendant's acts and conduct were peaceful; that the Na-

tional Labor Relations Board had exclusive jurisdiction of the controversy and that their conduct was not in violation of the laws of the State of Ohio or of the United States (R. 6, 7 and 8).

During the period required to file the motion to remand, the hearing thereon, and consideration of the argumen's of counsel by the Federal Court, the Defendants, Union, President and Business Agent wholly ignored the restraining order and began anew the conduct enjoined by the State Court and continued it unceasingly until March 26, 1954.

To the answer of defendants, plaintiff filed its reply on April 14, 1954 stating the picketing of defendants was for an unlawful objective and was accompanied by intimidation, threats and coercion of plaintiff's suppliers and denied that the National Labor Relations Board had exclusive jurisdiction (R. 9-10).

It was on this state of the pleadings, the cause was tried, beginning May 5, 1954 (R. 11).

At the close of plaintiff's testimony, the defendants moved for a dismissal of the petition "on the ground that the plaintiff has failed to sustain the burden of proof and to sta'e a case entitling it to the relief sought." (R. 109.) There is no question of jurisdiction raised here.

At the close of defendants' testimony, defendants made the following motion: "I now renew the motion on the grounds previously stated, and request as well that the temporary restraining order heretofore issued be vacated." (R. 148.) Again, there is no question of jurisdiction raised. Defendants were relying on the weight of the evidence failing to sustain a finding, not that the Court was without jurisdiction to make a finding and an order.

On September 2, 1954, the Common Pleas Court made a finding embodying First, that the Common Pleas Court had jurisdiction, and Second that the acts and conduct of defendants created a situation that justified the making of a permanent injunction order (R. 148-149).

On October 18, 1954, the Court entered an order, upon its finding of facts, enjoining the defendants from trespassing on its property; and from using threats, force and violence to prevent suppliers furnishing or selling merchandise to plaintiff (R. 156-157).

Defendants not being pleased with this order, on October 27, 1954 filed their Notice of Appeal, bringing this cause to the attention of the Court of Appeals for the Ninth Judicial District of Ohio on questions of law and fact (R. 158). In this Court the case was tried de novo. It was not an error proceeding dealing with the law as stated in the lower court. The parties were afforded the opportunity to present new and additional evidence, cross examine witnesses, try their case anew and argue orally and by way of brief. The Court of Appeals on May 18, 1955, after hearing all the evidence and receiving and considering the briefs of counsel made its finding of facts (R. 158-166). Succinctly, the Court of Appeals said:

> "It is not necessary to discuss jurisdictional yard sticks * * * It is not necessary to explore what areas in labor controversies are left open to the jurisdiction of the state courts. It is apparent that we have before us in the instant case, a question of fact which may be stated. * * * Do the facts herein show that Fairlawn Meats, Inc. is an 'industry affecting commerce' within the terms of the National Labor Management Act (R. 160). * * *
>
> "The evidence herein clearly shows that the business of the plaintiff is purely of a local character. It

is limited in the main to Akron and the surrounding area. The volume of business is not large for a city and county as populous as Akron and Summit County; it does not sell any of its products outside of the State of Ohio. Its purchases from out of this State, both direct and indirect, do not constitute a large portion of the products it offers for sale to the meat-consuming public in Akron and Summit County.

"We find, therefore, there is no burden placed upon or obstruction of interstate commerce by any action taken by the parties to this case." (p. 161.)

Here a tribunal having admitted jurisdiction of the *parties* to the suit, determined the *fact* that the business of the plaintiff and the conduct of the parties placed no burden or obstruction upon interstate commerce. This was an *issue* of fact raised by the parties submitted to the Court on evidence adduced by both sides, resulting in an adverse decision to the defendants. Their complaint was not lack of jurisdiction as contained in the motions but as they say "the plaintiff failed to sustain the burden of proof" (p. 109).

On May 31, 1955, the defendants moved for a new trial in the Court of Appeals (R. 166).

On June 4, 1955, the Court of Appeals entered its decree in the words of the decree of the lower court (R. 167-168).

On June 17, 1955, defendants filed their Notice of Appeal to the Ohio Supreme Court (R. 169) and their Motion to Certify on June 27, 1955 (R. 170). On the Appeal and the Motion to Certify, the Supreme Court of Ohio dismissed the Appeal after hearing upon the transcript of the Record of the Court of Appeals of Summit County "for the reason no debatable constitutional question is involved in said cause" (R. 172).

On November 22, 1955 defendants filed an Application for Rehearing on the ground the Court of Appeals' decision was in conflict with *Grimes & Hau · , Inc. vs. Pollock*, 163 Ohio State 372, a proceeding in which plaintiff alleged that it was engaged in interstate commerce. And, further that the Court of Appeals decision denied employees the right to strike to redress their own grievances (R. 173). Since the decision of the Court of Appeals neither was in conflict with *Grimes & Hauer, Inc.* nor denied employees the right to strike, the Supreme Court of Ohio did not grant a rehearing.

It is to be noted that the National Labor Relations Board has at no time been consulted by the Defendants either to petition for an election for certification as agent for plaintiff's employee or to file a charge of unfair labor practice. From February 11, 1954 to November 22, 1955, the defendants utilized the courts and judicial processes of the State of Ohio in Akron and Columbus, Ohio, and the United States District Court in Cleveland, Ohio.

Certiorari was permitted by this Court on May 7, 1956, together with an invitation to the Solicitor General of the United States to file a brief in behalf of the National Labor Relations Board.

B. THE PARTIES.

Plaintiff-Respondent.

Fairlawn Meats, Inc., the plaintiff in this action in the State Court is an Ohio Corporation whose sole stockholders are Nina and Harvey Ekers. (R. 36). The company began business by opening a meat market on West Market Street, Akron, in 1951; in March of 1952 it opened a meat market in Tallmadge, Ohio, and at West Richfield, Ohio,

in October of 1953. At West Richfield, the land and store are owned by the company and the company is engaged ninety percent (90%) in retail sales of meat and ten percent in locker storage facilities (R. 46). At West Market, the company has no interest in the real estate, but leases space in a market selling groceries, where the company's business is the retail selling of meat, frozen fish and allied items (R. 47). At West Richfield, seven (7) are employed, and at West Market four (4) are employed. The store operated by the company at Tallmadge is leased and normally employs thirty (30) to thirty-five (35) people and its business is ninety-five percent (95%) retail, and the balance is wholesale, i.e. to restaurants in the Akron area (R. 48). The principal purchases are made from suppliers in Ohio (R. 49). In the case of purchases from outside the state, which amount to ten (10) or fifteen (15) percent of the purchases, they are made (R. 49) from local salesmen who call upon the plaintiff, collect for the sales and deposit the proceeds in local banks. Two of the main sources of supply are packers, Gibbs and Peerless of Cleveland, Ohio. Purchases are limited to dressed beef (R. 60). For the year 1953, total purchases, including meats, cheese, poultry and fish, of $873,976.23 were made (R. 65). Of this figure purchases from outside the State of Ohio were made through local representatives of $103,-706.35.

The defendants attempted to show that the dressed meat sold to the plaintiff by Peerless came from cattle purchased outside of the State of Ohio. On this point the defendant's witness, a representative of Peerless (R. 138-139), testified plaintiff purchased $221,526.20 worth of meat in 1953 (R. 143). That the livestock slaughtered in Cleveland, Ohio were purchased on the basis of 56.78%

coming from outside Ohio and 42.22% from within Ohio (R. 145), and that Peerless discontinued selling plaintiff because "there was labor trouble" (p. 146). In the case of Packer Gibbs from Cleveland, defendants called the certified public accountant of Gibbs, who testified plaintiff made purchases of $146,073.90 in 1953 but the company had no knowledge of where the cattle came from, which were slaughtered in Cleveland, Ohio, and delivered to Fairlawn (R. 96).

The Defendants-Petitioners.

The defendant Union, Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 427 A.F.L. is a labor organization admitting into membership employees in markets operating meat departments in Cuyahoga, Summit, Stark, Portage and Medina Counties (R. 15), i. e., everybody who is employed in a meat market, except supervision (R. 16). In the counties named all contracts of the defendant union contain the union shop clause. On February 2, 1954 the members of Local 427 met in Akron, Ohio, between 50 and 100 in number. They took a strike vote, i.e., employees of other companies did the voting, as the Union officers saw only some of Fairlawn's employees at the meeting, less than ten (10) in number (R. 21) but could not tell how many. Local No. 427 is not employed by the plaintiff. The Union nor its representatives did not know as late as February 11, 1954 how many employees worked at Fairlawn; did not know how many employed at Fairlawn were members (R. 38). It did not know the scale of pay at Fairlawn (R. 38). Its general contract throughout the area (R. 39) contains the Union shop clause requiring membership in the Union as a condition of employment--thirty (30) days

after employment or the signing of the Contract (R. 39). At the meeting on February 2, 1953, a strike at Ekers was authorized by the membership (R. 41). The Union's business agent did not know at the time the strike was authorized whether or not it had a single signed up member at Fairlawn (R. 43.).

Defendant Sam Pollock is not and never was an employee at Fairlawn. He has been the full-time President of Meat Cutters Local Union 427 Affiliated with the Amalgamated Meat Cutters and Butcher Workmen, A.F.L. since May 12, 1953. Prior to that he was an international Union representative (R. 15).

Defendant James Dougherty is not and never was an employee of Fairlawn. He has been the full-time business agent of defendant Local 427 since June 1953. (R. 37).

C. PLAINTIFF'S RELATION WITH ITS EMPLOYEES.

Plaintiff employs seven (7) regular employees at Richfield; four (4) regular employees at West Market; thirty to thirty-five (30-35) regular employees at Tallmadge (R. 48). Extra help or part-time employees, a trucker, bookkeeper and managers increase this number of employees by eight.

The Union's business agent Dougherty called at the stores. Only on one occasion did a single employee mention any dissatisfaction (R. 39): He does not remember who the person was (R. 39); what the name was; and did not prepare a grievance to take it up with the employer. (R. 39). At no time was any opposition whatsoever offered the business agent to discuss the joining the Union, on company time and company property (R. 42). Free access to the employees for that purpose was given the Union representatives (R. 42).

During the three years of operation, Mr. Ekers says (R. 50):

> "Well, I have had differences of opinion in one or two cases over these three years, and as a result in possibly one case the party left my employ and went to somebody else's employ. And we are on the best—in both these cases that I can think of—we are on the best of relations—they felt they could do better elsewhere, and they went."

The company never was requested by the Union or any employee to discuss a grievance over wages, hours or condition of employment (R. 51). By February 4, 1954 no grievance of any kind had been brought to the company's attention (R. 51). When the Union left the standard form of contract through its business agent in August or September 1953 at the Tallmadge store (R. 37) he didn't see Mr. Ekers. Ekers upon reading the provision did ask the employees whether they wanted him to sign a Union contract which would force them to belong to the Union (R. 51) and not a single employee expressed a wish that such a contract be signed (R. 52). From the witness called by the defendants in an attempt to show an interference on the employer's part, by holding a party of Tallmadge employees after working hours at an inn a short distance from the Tallmadge store, we learn (R. 131) that the witness Rodocker attended all the parties and meetings which were held (R. 131); that at this meeting the opinions of the employees were requested (R. 132); that the meeting lasted about 1½ hours; that he and all the rest spoke openly that they didn't want the Union Shop (R. 135); that he had no grievance and for one year's wages he earned $6,315.00 or $1.90 an hour as a journeyman meat cutter (R. 134); for the same period at Kroger's where the Union has a contract he received $1.65 to $1.75 per hour

(R. 135); in addition thereto he was paid $100.00 for a week's vacation for one year's service.

A high school student was paid $1.00 per hour while a student and within six (6) months after he left school he was raised to $1.35 per hour. At his previous place of employment, Saalfield Publishing Company, he was paid eighty-five cents per hour (R. 143). The record conclusively establishes there was no dispute of any kind on any subject between the plaintiff's employees and plaintiff and the relationship between the employer and employees was most satisfactory to all concerned. At this point the defendants, utter strangers, made their unsuccessful efforts to organize. Failing in this through peaceful and voluntary methods they resorted to the next step of obtaining the employer's assistance to compel organization by the execution of a Union Shop agreement. Failing in this, they voted themselves into strike authority by the action of employees of competitors of the plaintiff. Failing to coerce the plaintiff by an expression of this authority, the defendants, not plaintiff's employees, then used the drastic method of picketing and coercing plaintiff's suppliers, by illegally trespassing on the Company's property and preventing by fear and threat plaintiff's suppliers of meat furnishing or delivering the meats needed for the business.

We shall now go to the subject in which we will set forth the acts and conduct of the Defendants as they relate to this plaintiff and its business on which the State Court issued its restraining orders.

D. THE CONDUCT OF THE DEFENDANTS-PETITIONERS.

Sam Pollock, President of Local 427 (R. 122), paid employee of the Union (R. 122) who was never in the meat business, first met Mr. Ekers, President of Fairlawn in May 1952 (R. 16). He asked him to recognize the Union for collective bargaining purposes (R. 16) and presented a uniform contract requiring compulsory Union membership after 30 days employment (R. 123). At that time Mr. Pollock says: "We had some membership, but I don't recollect how many" and "I don't want to hazard a guess." He discussed the Union shop, which is a standard clause in all contracts with meat markets (R. 17). Mr. Pollock at no time was ever in the stores to talk to any of the employees (R. 19). Mr. Pollock states Mr. Ekers told him that "he didn't like to see the Union come in," and that he expressed himself that way to the employees (R. 20). The members of Local No. 427 on February 2, 1954 took a strike vote. Mr. Pollock doesn't know how may Ekers employees were present, nor the number of people from the various other stores in Summit, Cuyahoga, Medina, Stark and Portage counties (R. 21). On February 3, 1954, armed with strike authority, Pollock addressed Ekers: "Well, under those circumstances, you fully understand that we may exercise our right to strike."

On February 3, 1954, Ekers told Pollock and Dougherty some of his employees didn't want to join the Union and "I don't care to negotiate now. I don't want to close the door" (R. 23). However, he had closed the door, because on February 4 at five o'clock in the morning all three stores were picketed by Pollock, Dougherty and members and officers of the Union, none of whom were employees of the plaintiff (R. 24). These pickets parked their cars off the road, opposite and across the street from the Tallmadge store (R. 25). They carried signs: "Please don't

patronize Ekers Meats. We are on strike" or words to that effect (R. 26). This picketing continued during the entire business hours conducted by non-employees and strangers of the plaintiff (R. 27). At Tallmadge picketing was in the driveways to the store (R. 26) and continued during the period the cause was before the Federal Court (R. 27, R. 28). Deliveries were not being made, and Mr. Ekers had to try to get deliveries himself for the business (R. 29). Picketing at Richfield, where the land and building are owned by the company, was conducted right in front of the market with pickets' cars parked on the company property and (R. 30, R. 33) not parked as customers (R. 34). In the latter part of August or early September of 1953, Business Agent Dougherty left the Union's standard contract at the Tallmadge store (R. 37) at which time Mr. Ekers was not there (R. 37). Three or four weeks later, Dougherty met Ekers for the first time (R. 37) but there was no conversation about the contract, except to remind Ekers it had been left (R. 38). Dougherty thought he had four members at that time, but didn't know how many were employed (R. 38). He didn't know what the scale of pay was (R. 38). In conversation with Pollock and Dougherty, Ekers stated "he was worried because if he did sign that contract he may lose some of his personnel" (R. 40), to which Pollock replied: "We have yet to see an employer lose a man" (R. 40). Ekers "talked about these people who didn't want to join the Union and he felt that he might lose them." (R. 40 and 51). Dougherty joined the picketing at 5 a.m. February 4 (R. 43), to stop deliveries and the employees from going to work (R. 44) although the store didn't open until 8 or 8:30 A. M. They used the driveways when pickets were few (R. 44); otherwise between the driveways, but they did not know on whose property they were picketing (R. 45). By virtue of the

picketing more than ninety percent (90%) of the deliveries were stopped (R. 52). Ekers with the help of employees picked up the meat and other supplies and hauled it to the stores (R. 52). After the picketing was resumed in March, pending the U. S. District Court ruling on plaintiff's motion to remand, business agents of the Union, Samino and DeSantis were making efforts to keep Ekers from getting supplies at Swift & Co., in Cleveland (R. 52). Their efforts were unsuccessful at Swift. As Ekers left Swift and Company to go to Peerless Packing Company the business agents followed him there. While attempting to obtain supplies from Peerless, which sales were refused, he returned to his car to find a flat tire (R. 53). The Union had prevailed upon Peerless not to sell to Ekers (R. 54). He was tailed many times by these agents of Local 427 while seeking supplies for the business (R. 54). Earl C. Gibbs, another Cleveland packer, refused to sell merchandise to Ekers (R. 54). As stated by the company's vice president, Earl M. Gibbs, March 5, 1954—Exhibit 10 (R. 184):

> "B. H. Ekers has been a customer of ours for over 30 years, and is a valued account.
>
> "We recently were advised by our Union president that it would be against our best interest, as far as good relationship with our Union is concerned, to continue to sell to Mr. Ekers.
>
> "In order to preserve our good relationship with the Union and its members, our workers, we have abided by their request."

On the morning of February 4, Ekers requested the pickets to stay off the company's property (R. 56). At that time there were twenty (20) or twenty-five (25), including Dougherty (R. 57). At West Richfield, he asked

the business agent of the Union, Mr. Koeber, to leave because he was trespassing (R. 57).

After the picketing was in progress from February 4 to February 10, forty-one (41) employees on February 10 while working in the stores signed the following paper:

> "We, the undersigned, employees of Fairlawn Meats, Inc., hereby certify that there is no dispute or disagreement between us and our employer, Fairlawn Meats, Inc., as to hours of work, rate of pay or any other conditions effecting our employment and we are not on a strike versus our employer, and we are not in favor of our employer signing any agreement that will force or compel us to join any union." (Exhibit 12.)

The Union attempted to show coercion practiced upon three employees. These witnesses called by the Union said:

(a) *Tandarich*: "I didn't have to sign if I didn't want to." (R. 141.)

"Question: Nobody threatened you, did they?
Answer: No, they never." (R. 142.)

(b) *O'Dell*: "They brought the petition around, and everyone was standing around, and they told me if I wanted to sign it, it was all right, and if I didn't it was all right. So, I signed it the same as everyone else." (R. 140.)

(c) *Mayo*: "Mr. Thursby handed this (the petition) to me and said: 'Sign this.' I said: 'Do I have to?' He stuttered and says: 'Well if you want to.' I signed it. I felt I had to. (R. 138.) The Court struck out: 'I felt I had to.'" (R. 138.)

SUMMARY OF ARGUMENT.

A. The State Court has the right and duty to determine whether the essential conditions exist to exercise its jurisdiction. *Texas R. Co. vs. Gulf Refining Co.*, 270 U. S. 266. Having found that the plaintiff's business did not affect interstate commerce, it was the duty of the State Court to pass upon the grievance and apply the laws of the State to the facts of the case and render its judgment subject to and limited only by review in the United States Supreme Court. *Amalgamated Clothing Workers vs. Richman*, 348 U. S. 511.

B. Even assuming that the controversy affects commerce within the meaning of the National Labor Relations Act, the state courts below properly held that they had jurisdiction because the National Labor Relations Board (N. L. R. B. or Board) would decline jurisdiction in the matter. This Court has recently reserved decision on whether a state court may apply state law or policy in such circumstances. *Building Trades Council v. Kinard Construction Co.*, 346 U. S. 933.

Petitioners concede, the N. L. R. B.'s brief states, and the findings of the trial court are that the case here does not fall within the Board's announced jurisdictional standards and accordingly the Board would decline jurisdiction. The facts of record likewise establish this to be the case. It would have been futile therefore for Respondent to have sought any relief through the N. L. R. B. *Building Trades Council v. Kinard Construction Co.*, 346 U. S. 933. This Court has approved the Board's practice of declining to take jurisdiction in cases where the impact upon commerce is slight, in order that it may devote its limited budget and personnel to the prompt handling of major cases and thus better effectuate the purposes of the Na-

tional Labor Relations Act. *NLRB v. Denver Building and Construction Trades Council*, 341 U. S. 675, 684; *Breeding Transfer Company*, 110 NLRB 493, 35 LRRM 1020, 1021.

Labor relations over which the several states have traditionally exercised control remain within state power until pre-empted by the Congress. *Allen Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740, 748-750; *Weber v. Anheuser Busch*, 348 U. S. 468, 480. And the intention of Congress to exclude the states must be clearly manifested (*Allen Bradley Local, supra*, at p. 749) because Congress has the power to speak clearly to that end. The National Labor Relations Act does not expressly state the extent to which the states are excluded and since here the case is one where the delegated power, if any, "lies dormant and unexercised" (*Bethlehem Steel Co. v. N. Y. State Labor Relations Board*, 330 U. S. 767, 775), there is no logical basis for implying the exclusion of state power.

The basis for denying to the states their power to act in matters of labor relations is the possibility of conflict with paramount federal authority. *Garner v. Teamsters Union*, 346 U. S. 485, 490-491, 498-499; *United Construction Workers v. Laburnum Construction Corp.*, 347 U. S. 656, 663 (note 5) and 665. But there is no possibility of conflict with federal authority where, as in the circumstances here, the N. L. R. B. has announced that it will not take jurisdiction of the matter. Furthermore, the state courts and state labor boards are almost unanimously agreed that they may act where the N. L. R. B. declines jurisdiction. Otherwise a large segment of industrial relations, predominantly local in character and where labor organization is least developed and hence in greatest need

of state regulation, will be unregulated, leaving the parties to self-help with its bad effects upon the economy. See *e.g. Guss v. Utah Board* (Utah Sup. Ct.), 296 P. (2d) 733, 38 LRRM 2137.

It is also noteworthy that the state court action here was consistent with federal policy as laid down in the National Act. As found by the state courts below, the petitioning union was at all pertinent times a minority union representing but a fraction of Respondent's employees and the purpose of its picketing was to compel Respondent to sign a union-shop agreement and thus force its employees to join the union. Such picketing is both unprotected and proscribed by the National Act. Sec. 8(b)(2) of the Act; *Garner v. Teamsters Union,* 346 U. S. 485, 487, 488-489, note 5. Such activities were also found by the state Court of Appeals below to be unlawful under Ohio public policy and this Court has approved the legality of such a state policy. *Building Service Employees International Union v. Gazzam,* 339 U. S. 532. The federal and state policies being consistent and not in conflict and the federal Board declining jurisdiction, plainly state court jurisdiction should be upheld.

Practical considerations likewise support the ruling below. A contrary result would compel the N. L. R. B. to take jurisdiction in all cases falling within the scope of the National Act to the exclusion of arbitration tribunals as well as state courts, lest innocent parties be left without legal recourse where they have suffered unlawful damage. But the Board, with its limited budget and personnel, if burdened with many cases where the impact upon commerce is small, would be seriously hampered in carrying out the policies of the National Act in much more important cases where really serious threats to interstate

commerce are presented. Contrary to Petitioners' statement as to the Board's position, the Board's brief herein supports Respondent's contention that a state may act where the Board declines jurisdiction.

Petitioners' contention, based upon the proviso to Sec. 10(a) of the Act, that only by cession agreement with the N. L. R. B. may a state enter the field covered by the National Act, will not bear analysis. First, the proviso to Sec. 10(a) deals only with cases in which the Board asserts jurisdiction and does not purport to deal with cases which the Board leaves entirely free by declining for policy reasons to assert jurisdiction. The language of Section 10(a) shows that Petitioners are in error in asserting that that Section allows cession only in cases of "local" industries. It applies for example to large retailing over which the Board does assert jurisdiction. Accordingly, contrary to their contention the proviso to Section 10(a) is in nowise rendered meaningless by applying it only to cases where the Board asserts jurisdiction. Furthermore, the legislative history underlying the proviso demonstrates that Congress' concern was with the problem of concurrent jurisdiction by the National and state boards over the same controversy and not with the type of situation presented here, where the National board declines to enter the controversy altogether. This is made manifest by the fact that, as Petitioners concede, the proviso to Section 10(a) resulted from Congress' desire to meet situations made possible by *Bethlehem Steel Co. v. N. Y. State Labor Relations Board*, 330 U. S. 767. That case involved a nationwide steel enterprise over which the Board obviously asserts jurisdiction. Indeed the Board had there asserted jurisdiction and specifically declined to designate a foremen's bargaining unit. And what is most

significant, the Court specifically stated in that case that it was not passing upon the problem raised where the Board declines jurisdiction for policy reasons. 330 U. S. at 776. In the light of this Court's statement in that case, which was the progenitor of the Section 10(a) proviso, no basis exists for holding that such proviso was intended to deal with the type case now before the Court.

Second, Congress was well aware, when it enacted the proviso to Section 10(a) in 1947, of the Board's practice for policy reasons to decline jurisdiction in many cases, and since there is no evidence that Congress meant to take this power from the Board, its approval of the Board's practice is to be presumed. *Haleston Drug Stores v. NLRB*, 187 F. (2d) 418, 421, 422 (C. C. A. 9), cert. den. 342 U. S. 815. There is no reason to suppose that by Section 10(a) Congress was disapproving the correlative practice of state courts in assuming jurisdiction in that situation. Third, the debates on the conference report on the Taft-Hartley Act refute Petitioners' argument. 93 Cong. Rec. 6540.

Equally untenable is Petitioners' argument based upon the failure of Congress to repeal the proviso to Section 10(a). Occurrences in Congress since 1947 establish, if anything, congressional acquiescence in the Board's creation of jurisdictional standards and the state courts' assuming jurisdiction in such cases. Petitioners' entire reliance is upon "incompleted steps in the legislative process" and this Court has refused to draw inferences as to legislative intent from such incompleted steps. *Wong Yang Sung v. McGrath*, 339 U. S. 33, 47-48.

Likewise without foundation is Petitioners' reliance upon the recent decision of this Court in *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U. S. 62. In that case the Court simply held that a state court may not enjoin peaceful union picketing, protected by Section 7 of

the National Act, of an employer who fell within the Board's jurisdictional standards, on the ground that the union was not in compliance with Sections 9(f), (g) and (h) of the Act. In the subject case not only did the employer not meet the Board's jurisdictional standards, but the union's activity was not protected, and indeed was proscribed, by the National Act.

ARGUMENT.

JURISDICTION OF THE STATE COURT.

At the outset of this discussion, we must recognize throughout that we are dealing not with employees of Fairlawn but with the Butchers Union, its President and its Business Agent. They alone are the defendants. There is not a shred of credible testimony in the record which establishes the Union or its officers as representatives of any of the employees for bargaining purposes, and at no time did the defendants furnish either to the employer or to the Court any evidence tending to establish representation of a majority. Nor is there any order directed against employees of Fairlawn, nor any attempted infringement of the right to strike, or any conflict in the labor policy of Ohio as it meets the Congressional labor policy. Nor has there been any effort or act upon the part of the Ohio judiciary to ignore the national policy as enunciated by Congress and interpreted by this Court. The Courts of Ohio have enunciated the policy of the State to be that picketing by strangers to the employer-employee relationship for the purpose of coercing an employer to execute a contract which requires his employees against their will to join the picketing union is for an illegal objective and will be enjoined. This policy is not in conflict with any provision of the Labor Management Act.

We must recognize here as the Court has recognized in *National Labor Relations Board versus The Babcock & Wilcox Co.; National Labor Relations Board versus Seam Prufe, Inc.*, and *Ranco, Inc., versus National Labor Relations Board*, 76 Sup. Ct. 679, that the distinction between employees soliciting and non-employee union solicitors is one of substance. As this Court said on page 685:

(10-13) "The distinction is one of substance. No restriction can be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline. Republic Aviation Corporation versus National Labor Relations Board, 324 U. S. 793, 803, 65 S. Ct. 982, 988, 89 L. Ed. 1372. But no such obligation is owed non-employee organizers. There access to company property is governed by a different consideration. The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others. Consequently, if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property. No such conditions are shown in these records.

"The plants are close to small well-settled communities where a large percentage of the employees live. The usual methods of imparting information are available. See, e.g., note 1, *supra*. The various instruments of publicity are at hand. Though the quarters of the employees are scattered they are in reasonable reach. The Act requires only that the employes refrain from interference, discrimination, restraint or coercion in the employees' exercise of their own rights. It does not require that the employer permit the use of its facilities for organization when other means are readily available."

We sincerely urge the application of at least a portion of semantics, the science dealing with meaning as contrasted with phonetics, the science of sounds. We have read many statements on "vacuum," "pre-emption," "vesting" and "divesting." For a moment let's examine what they "mean," not merely how they "sound." It is axiomatic that Congress has no inherent power; it has only delegated powers, which were delegated to it as a constitutional branch of government by the people of the States. In the States there inherently existed the right of the people to preserve and protect themselves and enact rules of conduct, which would preserve and protect their individual lives and property. This was something never delegated by the States to the United States. This is something that existed in the State, in the beginning has never been delegated to anyone and still remains in the State. We can not have a vacuum in a container, where something still remains. There is no vacuum in Ohio. The inherent right of the people to obtain through their State Courts the adjudication of problems dealing with the existence and protection of their life and property was never delegated, and cannot be preempted by a Congress, which has not received the sanction of the States to preempt a field within the States. Let us not be confused by the false premise that all rights lie in the United States, the creature of the "united states," because the United States has no inherent power. No one has yet the audacity of speaking of "divine right," as an attribute of the United States, nor to mention the conflict of 1861-1865 as a war of the United States against the Confederacy. It is correctly referred to as the war between the States. We have not yet heard of any repeal of the Tenth Amendment providing that:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Courts of Ohio have not attempted to question the power of the National Labor Relations Board to promulgate rules, which shall be used by the Board to determine the impact of the particular business upon interstate commerce. They have not questioned the reasonableness of yardsticks created by the Board. They have not attempted to declare what are and what are not unfair labor practices in the field of interstate commerce. They have not rendered a single decision that is in conflict with the National policy on labor. They have not used the federal laws as a basis for the determination of what is an offense or what conduct is contrary to the public policy of the State of Ohio. This is true even though the long arm of the high sounding word "commerce" has reached out to govern the peanut vendor on the street corner and the butcher shop at the country cross-roads.

Now, who has the primary right to determine whether Ekers' business affects interstate and whether the acts and conduct of interlopers to control the living of his employees constitute violation of the public policy of Ohio. This Court has many times stated that it is the duty of State Courts to enforce the public policy of the State and it is immaterial whether the public policy was announced by the legislature or the Courts of the State. This obligation lies in the State Court in a case presenting facts such as here.

The right, duty and power of the trial court to examine the facts and conditions essential to the exercise of its jurisdiction is clearly set forth by this Court in *Texas*

R. Co. vs. Gulf Refining Co., 270 U. S. 266; 46 Sup. Ct. 263, decided March 1, 1926. At page 274, Justice Brandeis said:

> "The issue presented to the Court by a denial that the proposed trackage is an extension does not differ in its nature from that raised when the denial is directed to the allegation that the defendant is an interstate carrier. If the facts are agreed, the question is one of law. If they are not agreed, the Court must find them. In the case at bar, the District Court, having jurisdiction generally of the parties and the subject matter was called upon to determine whether an allegation in the bill, essential to the cause of action, was established. This, the Court clearly had the power to do. Moreover, even if the question were, as contended, properly one of jurisdiction, the objection urged could not prevail. *Every court of general jurisdiction has power to determine whether the conditions essential to its exercise exists.*" (Emphasis ours.)

In this case Justice McReynolds dissented on the ground the question should have been first submitted to the I. C. C.

In dealing with the question of jurisdiction in a suit under the Trading with the Enemy Act, this Court followed and cited *Texas R. Co. vs. Gulf R. Co.*, 270 U. S. 266 in *Jackson vs. Irving Trust Co.*, 311 U. S. 50, decided January 6, 1941.

In *Stoll vs. Gottlieb*, 305 U. S. 165, decided by this Court in 1938, this Court again followed 270 U. S. 266 and at page 171 said:

> "While a court does not have the power by judicial fiat to extend its jurisdiction beyond the scope of the authority granted to it by its creators, it has the power to interpret the language of the jurisdictional instrument and determine its application to an issue before the Court."

We have not had a little Wagner Act in Ohio. Possibly we are considered back-woodsmen, but we know of no power in Congress that can compel the Ohio Legislature to pass such an Act and create a Board similar to the National Board with whom an agreement may be made to handle the case load of the National Labor Relations Board for reasons of economy, cession of jurisdiction, ceding of authority or the many other fine sounding words attributed to this foolish theory. It would be just as reasonable and logical for the Ohio legislature to pass an Act which would create Courts with which the Federal Courts could make agreements to handle the cases pending in our Federal Courts for the sake of economy, etc. to lighten and reduce the case load which burdens the Federal District Courts in Ohio and throughout the nation. The absurdity of the suggestion destroys the logic of its assertion.

In the briefs of the Union and of the A. F. L.-C. I. O., we have read many quotes from Labor Board Reports as contrasted to Board decisions. Also, many predictions as to what decision the Board would make under this or that set of facts. The charge is made that the jurisdictional standards set up by the Board "were in fact politically motivated" (Brief A. F. L.-C. I. O. p. 12). We have no access to the minds of the members of the Board to predict what will be the decision of the Board on any particular set of facts or circumstances but we firmly believe the litigant and lawyer must await trial and decision before the Board to announce with any degree of accuracy what is its answer. Nor had we expected to have to meet a political argument in the defense of the rights of the Courts of Ohio to hear and determine a matter before them. Much might be said on political motivation, which would be neither new, enlightening nor helpful to this Court, as we

are sure the Court well knows, that acts and conduct in government, outside the judiciary of our nation, are largely "politically motivated" and there is little our courts or its officers can do about it.

Historically speaking the Wagner Act was primarily intended to declare a right which existed inherently in the individual working man. The right to organize and join a union of his own choosing to bargain collectively seemed to be questioned by the issuance of injunctions largely at the hand of Federal Judges. The Act took nothing away that existed either in the individual or in the Courts of the State in which he resided. Labor leaders and legislators understood that in declaring this right a federal policy it would require some constitutional attachment to protect it against attack. That attachment turned out to be the "commerce" clause of the Constitution. (U. S. C. A. Title 29 Sec. 141). Congress in its definitions defined "industry affecting commerce" as "any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce." (U. S. C. A. Title 29 Sec. 142). The "commerce" Congress is dealing with obviously is "interstate commerce." It is powerless to deal with any other. Article I Section 8 Clause 3 of the Federal Constitution says the Congress shall have power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." This was a grant to Congress of power over interstate commerce but was no limitation upon the right of the state to deal with its internal affairs, including the problems arising in intrastate commerce. When there has been a clash on what constitutes interstate commerce and what constitutes intrastate commerce, the Courts of Ohio have uniformly

been scrupulously careful to protect the litigant whose business, conduct, contract, franchise, or other rights asserted brought him into the category of interstate commerce. For example, in *State vs. Cleveland & P. R. Company,* 94 O. S. 61, the Supreme Court of Ohio recognized the paramount right of the U. S. to control navigable waters and establish harbor lines.

Ordinances restricting the speed of trains within city limits in an unreasonable manner are invalid. *Blanche vs. New York Central Railroad Company,* 103 O. S. 471.

The State has no power to fix ferriage rates. *Bellaire vs. B. & W. Ferry Co.,* 105 O. S. 247.

State Workmen's Compensation Laws do not apply to services rendered by employees of corporations of other States performed in interstate commerce only. *Spohn vs. Industrial Commission,* 138 O. S. 42.

A statute designed to forbid a railway from establishing a relief association, membership in which would require a waiver of right of action against the railway for personal injuries is unconstitutional if applied to railways in interstate commerce, and could be applicable only to those engaged in intrastate commerce. *State ex rel. Simpson vs. Pennsylvania Co.,* 85 O. S. 540.

Whether the question presented concerned a legislative act of the State of Ohio or one of its municipalities or the assertion of a right by an individual, the Courts of Ohio have in the past and may be expected in the future to deal without bias or prejudice and with sound discretion with the facts bearing upon interstate or intrastate commerce. This Court may well expect litigants in the Courts of the several States to be treated likewise.

In the Labor Management Act, instead of using the customary words used in other Federal Acts "engaged in interstate commerce," it was broadened to "affecting inter-

state commerce." Certain interests seek to broaden it further by dropping out the word "interstate" and construe the Labor Management Act as covering everybody "Affecting commerce." An act, originally intended to declare a right that had been questioned in the Federal Courts largely, has developed into an all embracing octupus sending its tentacles out to envelop the little as well as the big in a wholly local situation, where only as a figment of the imagination is interstate commerce affected in truth and fact.

Whether we view affecting interstate commerce by "de minimis" or by "labor board yardstick," "affecting interstate commerce" is a question of fact. Congress has not attempted to describe this term by metes and bounds. We need not enter the field of speculation as to why. Let it be sufficient to assume there were men learned in the law who realized that interstate commerce was a condition precedent to the attaching of jurisdiction by a Federal Court or Board set up to administer the act. It is not a question of the State Court giving up a duty and having it returned by vesting or by agreement with the Labor Board. It is the question of establishing as a fact that Ekers' business and conduct affected not merely commerce, but interstate commerce. Ekers had sought relief in the Courts of his State. The Federal Court found his claim did not present a Federal question. When back in the Court of his State, he is met with the defense that he has filed in the wrong place because his business affects interstate commerce. Is the mere assertion by a litigant that his adversary is engaged in a business affecting interstate commerce sufficient to deprive the Court of its jurisdiction to hear the case, pass upon the evidence, make its findings and enter valid orders? The answer is, obviously, "No." The Court did not rely upon the bold assertion in

the answer that interstate commerce was affected. It heard the evidence adduced by both parties on this question.

In order to reverse the holdings of the Ohio Court, this Court must find no state court in the nation can hear and determine a question of fact, particularly if the question is: "Is one of its citizens engaged in a business that affects interstate commerce." It must say only the Labor Board has the right, the fairness and the intelligence to pass on this question and the Board's judgment is final except on review to the Board's general counsel.

We have not attempted to over-simplify the position of Ohio's Courts or of my client's position, but we sincerely feel the foregoing should be dispositive of this cause. We have carefully examined the decisions of this Court as they pertain to the Rules of the Board, the Board's jurisdiction to make rules and regulations regarding jurisdictional standards and the Preemption of the Field of Labor by the Act. With these questions we shall now deal, for such assistance as it may be to the members of this Court.

THIS COURT HAS NEVER DIRECTLY DECIDED THIS ISSUE, BUT IN SEVERAL CASES HAS INDICATED THAT STATE JURISDICTION COULD PROPERLY BE EXERCISED TO PROVIDE DUE PROCESS OF LAW.

The doctrine of federal preemption in the labor relations field and the interrelationship of the jurisdiction of federal and state tribunals has recently received considerable attention by this Court.[1] In some of these cases it has been held that the exercise of state jurisdiction was precluded, while in others, under different circumstances, the propriety of state action has been upheld. In the *Anheuser-Busch* case, 348 U. S. 468, this Court set out a rather comprehensive review of "where our decisions have brought us" in this field indicating quite clearly that the basic factor distinguishing the two types of cases was the existence or non-existence of actual or potential conflict of judicial decisions between federal and state tribunals applying identical remedies to the same identical conduct. Also as succinctly stated in the *Laburnum* case, "if no conflict had existed, the state procedure would have survived." 347 U. S. 656.

While this Court has thus dealt extensively with this general field, it has never had occasion to rule directly on the issue involved in this case—whether the employer who is too insignificant in volume of interstate commerce to meet the Board's jurisdictional standards, whose labor

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[1] *International Union v. Wisconsin Board*, 336 U. S. 245, 93 L. Ed. 651, 69 S. Ct. 516; *Bethlehem Steel Co. v. N. Y. S. L. R. B.*, 330 U. S. 767, 91 L. Ed. 1234, 67 S. Ct., 1026; *Algoma P. & V. Co. v. W. E. R. B.*, 336 U. S. 301, 93 L. Ed. 691, 69 S. Ct. 584; *Garner v. Teamsters*, 346 U. S. 485, 98 L. Ed. 228, 74 S. Ct. 161; *United Constr. Wkrs. v. Laburnum*, 347 U. S. 656, 98 L. Ed. 1025, 74 S. Ct. 833; *Weber v. Anheuser-Busch*, 348 U. S. 468, 99 L. Ed. 546, 75 S. Ct. 480; *Amalgamated Clothing Workers v. Richman Bros.*, 348 U. S. 511, 99 L. Ed. 600, 75 S. Ct. 452; *U. A. W. v. W. E. R. B.*, ------ U. S. ---------, 100 L. Ed. 666; and other cases.

relations do not "affect commerce" in the Board's Congressionally authorized discretion, who cannot obtain any hearing or remedy from the federal tribunal because it would not effectuate the policies of the Act for the Board to take or exercise jurisdiction over such business—whether an employer so isolated from the federal Act, the federal tribunal, and federal remedies shall also be denied access to the proper state tribunal and remedies and thus be placed in a judicial vacuum, where he has no access to any tribunal or remedy whatsoever.

Although this Court has never specifically decided this precise question, it has not been unaware of its importance, and has frequently indicated what the decision would be. In those cases where states have been prevented from exercising jurisdiction, this Court has been careful to distinguish our present situation from the one there involved; in those cases sustaining the exercise of state jurisdiction, the controlling principles have been clearly announced. The basic principles and underlying considerations established by such cases are applicable and controlling here. As the following brief references show, and as we will more fully establish below, where conduct is "governable by the state, or entirely ungoverned," the choice must be in favor of state control and against anarchy.

Thus, in *International Union v. W. E. R. B.*, 336 U. S. 245, 254, this Court sustained state control of a phase of labor relations of an employer admittedly engaged in interstate commerce. However, as to the particular conduct involved, the Court noted that "There is no existing or possible conflict or overlapping between the authority of the Federal and State Boards * * *. This conduct is governable by the state or it is entirely ungoverned."

Similarly, in *Algoma Plywood & Veneer v. W. E. R. B.*,

336 U. S. 301, 313, again involving an admittedly interstate business, the Court noted that the federal Act only covered unfair labor practices "listed in section 8" and held that the "States are free" to deal with unfair labor practices "not listed in Section 8." The Court said "where the State and federal laws do not overlap, no cession is necessary because the State's jurisdiction is unimpaired."

In *Bethlehem Steel Co. v. N. Y. L. R. B.*, 330 U. S. 767, 776, the Court denied state power to certify foremen's unions as appropriate after the federal Board had already announced its policy to the contrary. But it reserved as distinguishable the question presented here, saying, "The election of the National Board to decline jurisdiction in certain types of cases, for budgetary or other reasons, presents a different problem, which we do not now decide."

In *Garner v. Teamsters*, 346 U. S. 485, 488, the Court limited the application of that decision to cases of direct jurisdictional conflict, saying, "This is *not* an instance of injurious conduct which the National Labor Relations Board is without express power to prevent, and which therefore is 'governable by the State or it is entirely ungoverned'." As in *Bethlehem Steel, supra*, the Court specifically anticipated and reserved the issue now presented —"Nor is there any suggestion * * * that the federal Board would decline to exercise its powers once its jurisdiction was invoked."

Finally, the most specific statement was made in *Building Trades Council v. Kinard*, 346 U. S. 933, 98 L. Ed. 423, where the Court said:

> "Since there has been no clear showing that respondent has applied to the National Labor Relations Board for appropriate relief, or that it would be futile to do so, the Court *does not pass upon the question*

suggested by the opinion below of whether the state court could grant its own relief should the board decline to exercise its jurisdiction."

The principal issue of this case is therefore one which this Court has specifically reserved and pointedly distinguished from those in previous cases where state jurisdiction has been denied. We submit that the Court has done so because constitutional considerations require the exercise of proper state jurisdiction in the circumstances of this case.

Since the propriety of the Board's action in establishing jurisdictional standards has been demonstrated above, there is no appeal, review, or recourse from the Board's refusal to take jurisdiction in such cases. To such a rejected complainant, the federal law, the federal Board, and the federal remedies are equally as valueless and nonexistent as they are to the most "intrastate" complainant that could possibly be imagined. Both are completely insulated and isolated from the federal law, procedures, and remedies, one by statutory definition, and the other by Congressionally and judicially approved interpretation of that definition. One is clearly and admittedly free to resort to the state courts for an adjudication of his grievance, and application of state remedies, if warranted—the only available remedies under the circumstances. How is the other to be treated? Will his grievance be heard anywhere, or will he be denied his constitutional guarantee of due process of law?

Thus, where this Court has held that if conduct is "governable by the State or entirely ungoverned" it must be governable by the state,[2] the union instead maintains

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[2] *International Union v. W. E. R. B., supra; Algoma Plywood & Veneer Co. v. W. E. R. B., supra; United Constr. Workers v. Laburnum, supra; U. A. W. v. N. L. R. B., supra.*

it should be entirely ungoverned. We submit that the union's contention is wrong. While the Board can and has properly interpreted the Act to mean that certain businesses are too small to require application of the federal law to effectuate its purpose, and has therefore declared that its federal jurisdiction will not encompass them, it has not ostracized such people or converted them into legal lepers that no Court can touch.

ASSUMING THAT THE INSTANT CONTROVERSY AFFECTS COMMERCE WITHIN THE MEANING OF THE NATIONAL LABOR RELATIONS ACT, SINCE THE NATIONAL LABOR RELATIONS BOARD WOULD DECLINE TO EXERCISE JURISDICTION HERE, THE STATE COURT CORRECTLY CONCLUDED THAT IT HAD JURISDICTION OF THE CASE.

Assuming, without conceding, that the controversy affects commerce within the meaning of the National Labor Relations Act, 61 Stat. 136, 29 U. S. C. Supp. V, 151 *et* seq., the state court correctly asserted jurisdiction in the case, because the National Labor Relations Board (hereinafter sometimes called the N. L. R. B., the National Board, or simply the Board) would decline jurisdiction in the matter. This Court has at least twice in recent years reserved decision on the question of whether in such circumstances a state court has jurisdiction to apply state law or policy. *Building Trades Council v. Kinard Construction Co.*, 346 U. S. 933; *Garner v. Teamsters Union*, 346 U. S. 485, 488. We submit that the question should be resolved in favor of state court jurisdiction.

A. The Case Here Is One that Does Not Fall Within the Board's Announced Jurisdictional Standards and the Board Would Therefore Decline Jurisdiction.

The Board, with this Court's approval (*N. L. R. B. v. Denver Bldg. & Const. Trades Council*, 341 U. S. 675, 684), has long taken the position that it would better effectuate the purposes of the National Labor Relations Act

> "* * * not to exercise its jurisdiction to the fullest extent possible under the authority delegated to it by Congress, but to limit that exercise to enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce." *Hollow Tree Lumber Company*, 91 NLRB 635, 636, 26 LRRM 1543.

This policy was explained by the Board in a Memorandum filed with this Court in March, 1954, in *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656:

> "The Board's abstention from exercising the full measure of its statutory jurisdiction has been prompted, in general, by a policy to utilize its limited budget and personnel in the processing of cases which individually or in the aggregate present, in relation to the Board's potential case-load, the most serious threat to interstate commerce." (Board's Memorandum aforesaid, p. 5.)

More recently, the Board, explaining the reasons for its jurisdictional standards, said:

> "It has been the consistent position of the Board that it better effectuates the purposes of the Act, and promotes the prompt handling of major cases, not to exercise its jurisdiction to the fullest extent possible under the authority delegated to it by Congress, but to limit the exercise to enterprises whose operations

have, or at which labor disputes would have a pronounced impact upon the flow of interstate commerce." *Breeding Transfer Company*, 110 NLRB 493, 35 LRRM, 1020, 1021.

It becomes material therefore to determine whether in the instant case the Board would exercise its jurisdiction or would decline to do so in accordance with its announced policy. It is perfectly plain that here the Board would decline to exercise its jurisdiction and that it would have been futile for Respondent to have sought relief through it. *Building Trades Council v. Kinard Construction Co.*, 346 U. S. 933. Not only is this conceded by Petitioners (Pet. Br., p. 11, note 10), but the brief filed in this case by the Government on behalf of the Board states that the Board would not assert jurisdiction (Govt. Br., p. ____) and the findings of the trial court below are to the same effect (R. 149-150).

In addition, the facts of record show plainly that the case here is one falling far short of meeting the Board's jurisdictional standards. Thus when the Petitioners' strike and picketing began in February, 1954, the Board's jurisdictional standards then in effect were those laid down in a series of Board decisions issued in October, 1950.[3] These decisions announced that the Board would take jurisdiction in the future only over cases falling into nine categories, summarized by the Board at pages 5-7 of the Memorandum filed with this Court in the *Laburnum* case, *supra*, p. 36. The only categories possibly applicable to Respond-

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[3] These standards were also published in a Board press release [No. 342] issued on October 6, 1950, the relevant part of which is reproduced in Appendix A, pp. 79-80, *infra*. This Court has taken specific notice of such standards. *N. L. R. B. v. Denver Building and Construction Trades Council*, 341 U. S. 675, 685, note 14; *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656, 659, note 2.

ent's operations were categories labeled 6 and 7 in said Memorandum, embracing enterprises with a direct inflow of goods from out-of-state valued at $500,000 a year or with an indirect inflow of such goods valued at $1,000,000 a year (Appendix A, p. 80, *infra*). But Respondent's enterprise did not meet these figures, its total annual direct inflow of goods from out-of-state amounting to only a little over $100,000 (R. 66, 67-68; see also R. 50) and its total annual indirect inflow of goods from out-of-state amounting to only some $216,000 (R. 93-95, 143-145, 188 (Defendants' Exh. 15-B).[4] Accordingly the Board would not have asserted jurisdiction over Respondent under its October, 1950, tests.

In *Hogue & Knott Supermarkets*, 110 N. L. R. B. 543, 35 LRRM 1060, decided October 26, 1954, the Board announced new jurisdictional standards as to retail stores. Under such standards, in the case of an intra-state chain of retail stores—the situation here (R. 46-49, 150, 158-159, 161)—the Board will assert jurisdiction over the entire chain or any store in the chain *only* if the total business of *all* the stores in the chain shows that (a) $1,000,000 yearly in purchases come directly from outside the state or (b) $2,000,000 yearly in purchases come indirectly from outside the state or (c) $100,000 yearly

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[4] These figures on indirect inflow were obtained by adopting the theory of Petitioners' counsel (R. 93-94) and attributing to Respondent's business the same percentage of indirect inflow of out-of-state goods as its suppliers' direct inflow of such goods. Thus if Respondent's annual purchases from supplier Gibbs were some $146,000 and Gibbs' out-of-state purchases were 61½ per cent of its total purchases (R. 93-95, 188) it was assumed that Respondent's indirect inflow of out-of-state goods through supplier Gibbs was 61½ per cent of $146,000 or some $90,000. The same method of calculation was used with respect to Respondent's indirect out-of-state purchases through supplier Peerless (R. 143-145).

is shipped to other states.[5] We have already shown that Respondent does not meet either of the purchase tests, i.e., tests (a) or (b). And Respondent does not meet test (c) either for it does not sell or ship any of its goods outside of the state of Ohio (R. 86, 161). Patently then, Respondent's operations do not qualify under the Board's present jurisdictional standards any more than they did under the Board's 1950 standards.

B. Since the Board Would Decline Jurisdiction Herein the State Court Had Jurisdiction to Decide the Issues.

It would seem almost a truism that an employer, aggrieved by unlawful conduct of a union or his employees, must be entitled to appeal to some forum—state or federal—to obtain relief. If the door is closed to him through the avenue of the National Labor Relations Board, then he must be able to appeal to the state courts. Otherwise, although he is an innocent party, he is compelled to suffer the unlawful conduct without redress. This Court has already shown that it would countenance that situation only under the most compelling circumstances and only if the Congress had in the clearest language announced that to be its intention. See *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656,

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[5] On July 15, 1954, the Board had issued a press release (R. 449) announcing general revisions in its jurisdictional standards. The standard there announced as to an intrastate chain of retail stores differed from the standard later announced in the *Hogue & Knott* case in that it required the individual store rather than the entire chain to meet the dollar volume tests set forth in the text. R. 449 is reproduced in Appendix B, pp. 81-87, *infra*; see also 1 CCH Labor Law Reporter ¶ 1610, pp. 1613-1617. This change is irrelevant here because as shown in the text, even Respondent's stores together do not meet the dollar volume test. The Board's 1954 standards apply today. They were noted by this Court in *Brooks v. N. L. R. B.*, 348 U. S. 96, 104, note 16.

669, upholding a state court tort action against a union for damages resulting from threats and intimidation which prevented the plaintiff from continuing a construction project, this Court saying that if the state court were denied jurisdiction, that would mean that where federal preventive administrative procedures are impotent or inadequate, the offenders may destroy property with impunity. And *cf. U. A. W. v. Wisconsin Employment Relations Board*, 351 U. S. 266, 274-275, where this Court allowed a state to enjoin violent union conduct that was also an unfair labor practice under the National Labor Relations Act, holding that local communities suffer most from the loss occasioned by coercion and that it would not interpret an act of Congress to leave such communities powerless to avert such emergencies without compelling directions to that effect.

As we shall show, all reason and authority call here for upholding the state court's jurisdiction to act.

1. Under Settled Principles, No Basis Exists for Implying the Exclusion of State Power.

The decisions of this Court are plain that "labor relations over which the several states traditionally have exercised control" (*International Union v. Wisconsin Employment Relations Board*, 336 U. S. 245, 252) remain within state power until pre-empted by the Congress. *Allen Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740, 748-750; *Bethlehem Steel Co. v. N. Y. State Labor Relations Board*, 330 U. S. 767, 772; *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656, 663, note 5; *Weber v. Anheuser Busch*, 348 U. S. 468, 480; *U. A. W. v. Wisconsin Employment Relations Board*, 351 U. S. 266, 271. Moreover, the

"intention of Congress to exclude states from exerting their police power [in this field] must be clearly manifested." (Emphasis supplied.) *Allen-Bradley Local v. Wisconsin Employment Relations Board,* 315 U. S. 740, 749 and cases there cited; *International Union v. Wisconsin Employment Relations Board,* 336 U. S. 245, 253; *U. A. W. v. Wisconsin Employment Relations Board,* 351 U. S. 266, 273, note 11.

This Court has also said that

> "The National Labor Management Relations Act, as we have before pointed out, leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible." *Garner v. Teamsters Union,* 346 U. S. 485, 488, note 4, *Weber v. Anheuser Busch,* 348 U. S. 468, 480.

While then the exclusion of state power may be implied, in deciding whether to make such implication, this Court considers "the respective relation of federal and state power to the general subject matter" at hand. *Bethlehem Steel Co. v. N. Y. State Labor Relations Board,* 330 U. S. 767, 772. And as Mr. Justice Frankfurter pointed out in his separate opinion in that case,

> "Since Congress can, if it chooses, entirely displace the States to the full extent of the far-reaching Commerce Clause, Congress needs no help from generous judicial implications to achieve the supersession of State authority. To construe federal legislation so as not needlessly to forbid pre-existing State authority is to respect our federal system. Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States." *Id.,* p. 780.

Applying the foregoing principles to the facts at hand, this is not a case for implying the exclusion of state authority. Unlike the situation in *Bethlehem Steel*, 330 U. S. 767, where the Board declined to designate a foremen's bargaining unit and that determination took on the character of a decision that said unit was inappropriate for bargaining purposes (330 U. S. at 774-775), the Board here has declined for reasons explained in the *Breeding Transfer* case, *supra*, pp. 36-37, to consider the case at all because the Respondent's business does not satisfy its jurisdictional standards. The case therefore is one where the delegated federal power "lies dormant and unexercised" (*Bethlehem Steel*, 330 U. S. 767, 775) and accordingly falls into the category of cases where state power has not been precluded. (*Id.*, pp. 773-774).[6]

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[6] It has even been suggested that the exclusion of state power should not be implied notwithstanding Congress has brought the matter within federal control, unless Congress has provided a remedy for the conduct from which it is sought to exclude the state power; and that in the absence of a federal remedy, the state remains free to apply its own remedy. See *Aladdin Industries v. Associated Transport* (Tenn. App.), 38 LRRM 2599, where the Court reached this conclusion based upon an exhaustive review of this Court's recent decisions on the subject. While support for this conclusion is found in such cases as *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656, and *Benz v. Compania Naviera Hidalgo*, 233 F. (2d) 62, 66 (C. C. A. 9), it is not necessary for this Court to reach that question here. The significant point here is that the National Labor Relations Board has declined to exercise its jurisdiction, regardless of whether the federal Act provides a remedy, and that in such circumstances there is no basis for denying the state court's jurisdiction.

2. The Principle Underlying the Exclusion of State Power Is In Conflict with Federal Authority and No Possibility of Such Conflict Exists Where the National Board Declines Jurisdiction Altogether.

Although, significantly, Petitioners' lengthy brief is wholly silent on this matter, the decisions of this Court establish that the basis for denying the states the right to exercise their power in matters such as that involved here is the possibility of conflict with paramount federal authority. Thus in *Bethlehem Steel, supra,* this Court pointed out (pp. 775-776) that both the federal and state governments had laid hold of the same relationship for regulation and it involved the same employers and employees. Each had delegated to an administrative authority a wide discretion in applying this plan of regulation and they were governed by different standards. The situation was too fraught with potential conflict (Bethlehem Steel obviously being an enterprise over which the National Board would assert jurisdiction) to permit intrusion of the state even though the National Board had not acted in the particular case. On the other hand, in *International Union v. Wisconsin Employment Relations Board,* 336 U. S. 245, 254, state prohibition of recurrent, unannounced work stoppages was upheld on the ground that conduct was neither protected nor prohibited by the National Labor Relations Act and hence presented no existing or possible conflict between federal and state authorities.

In *Garner v. Teamsters Union,* 346 U. S. 485, 490-491, 498-499, the Court emphasized that the conflict between the two governments (state and federal) lay in remedies and that the potential conflict was quite serious. And in *United Construction Workers v. Laburnum Con-*

struction Corporation, 347 U. S. 656, the Court said (p. 663, note 5):

> "The cases relied upon to exclude state jurisdiction are those where a conflict with federal control has been made clear."

The Court added (p. 665):

> "To the extent that Congress prescribed preventive procedure against unfair labor practices, that case [Garner] recognized that the Act excluded conflicting state procedure to the same end * * * The care we took in the *Garner* case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a *recognition that if no conflict had existed,* the state procedure would have survived. * * *" (Emphasis supplied.)

In *Weber v. Anheuser Busch,* 348 U. S. 468, 474-477, 479-480, the court took occasion to summarize its rulings on the "delicate problem of the interplay between state and federal jurisdiction touching labor relations" and again demonstrated that the major premise underlying federal pre-emption is conflict, actual or potential.[7]

The lower federal courts and state courts have also shown that as they understand the law laid down by this Court, conflict is the basis for allowing federal pre-emption and that in the absence of such conflict there is no pre-emption. See *U. E. v. Worthington Corp.,* 38 LRRM 2507, 2509, 2510 (C. C. A. 1) where the Court pointed out that "the basis of the [pre-emption] doctrine is the actual or potential conflict with N. L. R. B. adjudication that could arise were other tribunals to be permitted concurrent jurisdiction with duplicating remedies" and that "where

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[7] The Court's most recent decision in this field, *U. A. W. v. Wisconsin Employment Relations Board,* 351 U. S. 266, is to the same general effect.

the [National] Board would decline to exercise its statutory jurisdiction in deference to an available arbitral remedy, the basis for the pre-emption doctrine largely disappears, and it seems only logical that in such a case the lawful jurisdiction of the arbitrator be recognized." The court therefore upheld the jurisdiction of arbitrators to decide whether the dismissal of employees was for just cause under the applicable collective bargaining contract as against the contention that the matter was pre-empted to the jurisdiction of the National Labor Relations Board. This case is apt, notwithstanding it involved the jurisdiction of an arbitrator rather than that of a state court, for the doctrine of pre-emption, where applicable, applies equally to federal courts, state courts and agencies, and arbitration tribunals. *Weber v. Anheuser Busch,* 348 U. S. 468, 479; *Garner v. Teamsters Union,* 346 U. S. 485, 491; *Amazon Cotton Mills Co. v. Textile Workers Union,* 167 F. (2d) 183 (C. C. A. 4); *Aetna Freight Lines v. Clayton,* 228 F. (2d) 384 (C. C. A. 2); *U. E. v. Worthington Corp.*, 38 LRRM 2507, 2509.

Likewise showing that conflict is the basis for allowing federal pre-emption are *Born v. Laube,* 213 F. (2d) 407, *reh'g. den.* 214 F. (2d) 349 (C. C. A. 9), *cert. den.* 348 U. S. 855, *reh'g. den.* 348 U. S. 932; *International Union v. Underwood Corp.*, 219 F. (2d) 99 (C. C. A. 2); *N. L. R. B. v. Swift,* 130 F. Supp. 214 (E. D. Mo.), *aff'd. on other grounds* 233 F. (2d) 226 (C. C. A. 8); *Garmon v. San Diego Building Trades Council* (Calif.), 291 P. (2d) 1, 37 LRRM 2233, *cert. granted* 351 U. S. 923; *Guss v. Utah Board* (Utah), 296 P. (2d) 733, 38 LRRM 2137; *Adams Dairy v. Dairy Employees Union* (Mo.), 38 LRRM 2404, 2412 *et seq.*; *Minor v. Building Trades Council* (N. Dak.), 75 N. W. (2d) 139, 37 LRRM 2644, 2647 *et seq.*;

Milwaukee Store Company v. Hosiery Workers (Wisc.), 69 N. W. (2d) 762, 35 LRRM 2757, 2765 *et seq.*; *Machinists Union v. Goff-McNair Motor Co.* (Ark.), 264 S. W. (2d) 48, 33 LRRM 2641, 2643-2644; *Aladdin Industries v. Associated Transport* (Tenn. App.), 38 LRRM 2599, 2605-2609.

Applying the conflict rule to the case here, it is immediately apparent that there can be no conflict with federal authority where such authority lies dormant and unexercised and the federal Board has announced that it will not take jurisdiction over the matter. In such circumstances there is every reason to permit the state court to act and none to bar it from acting.

3. The Action of the State Court Here was Consistent With Federal Policy as Set Forth in the National Act.

We have heretofore contended that because the N. L. R. B. would decline to exercise jurisdiction in the premises here, for that reason alone the state court had jurisdiction to act. We do not believe that any more need be shown to establish state court jurisdiction. If it were necessary to go further and in each case show that state action was consistent with federal policy as set forth in the National Act, there would be imposed upon the Board the burden of policing the actions of the courts and administrative agencies of all the state and territories. But then the Board might just as well abandon its jurisdictional standards and take jurisdiction over all cases falling within the National Act. This, of course, would impose upon the Board a task so great that it would be unable to devote its energies to cases having a truly substantial impact upon the Nation's economy and it would thus be prevented from effectuating the policies of the Act.

Despite the foregoing, however, the fact is that the state court action here was consistent and not in conflict with federal policy as laid down in the National Labor Relations Act.[8]

The findings of the state Court of Appeals below are that the union here was a minority union representing at no time more than eighteen of Respondent's fifty employees (R. 159) and that less than ten of such eighteen actively interested themselves in the strike (*Id.*).[9] The findings of the courts below likewise are that the purpose of the picketing was to compel the Respondent to sign a union-shop agreement and thus force its employees to join the union (R. 151, 154-155, 159, 161-162, 163-165). These findings are amply supported by the testimony of record of witnesses for both sides (R. 16-17, 18, 20, 37-38, 39-40, 42-43, 47-48, 79, 116-118, 123-124, 126-127, 176 (Plaintiff's Exh. 2-B)). The trial court also found, in accordance with the evidence of record (R. 185-186 (Plaintiff's Exh. 12)), that of the fifty employees of Respondent, forty-one signed a statement several days after the picketing began that there was no labor dispute between them and Respondent, that they were not on strike and that they did

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[8] If it is for the N. L. R. B. and not the courts to decide what such federal policy is (see *Teamsters Local No. 25 v. N. Y., New Haven & H. R. Co.*, 350 U. S. 155, 161; *Weber v. Anheuser Busch*, 348 U. S. at p. 478), and the N. L. R. B. declines to consider the case and hence will not determine what such policy is, it would seem to follow that unless an aggrieved party is to be denied his day in court, a state court may act to protect him.

[9] The state Court of Appeals also found that while most of the employees who were union members stayed away from their jobs when the strike began, a few later returned to work and a few resigned their jobs (R. 159; see also R. 184, 185, 186 and 187 (Plaintiff's Exhs. 5, 11, 16 and 17)).

not favor Respondent signing an agreement which would compel them to join any union (R. 151).[10]

Since the union here was a minority union and the purpose of the picketing was to compel Respondent to coerce its employees into joining the union, it is clear that the picketing was not only unprotected, but actually proscribed, by the National Labor Relations Act.[11] Petitioners concede (Pet. Br., p. 48), as they must, that a union-shop demand is illegal under the National Act if the union lacks a majority. See *Garner v. Teamsters Union*, 346 U. S. 485, 487, 488-489, note 5; *Building Service Employees International Union v. Gazzam*, 339 U. S. 532.[12]

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[10] Contrary to Petitioners' statement (Pet. Br., p. 45), the state Court of Appeals did not rely upon this statement in finding that the union here was a minority union (R. 159). In fact that court did not even refer to such statement. That the union was a minority union was shown even by the testimony of the union's own witnesses (Tr. 116-118, 126-127).

[11] Section 8 (b) (2) of the Act makes it an unfair labor practice for a labor organization or its agents

> "* * * (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership * * *"

Subsection (a) (3) reads in part: "It shall be an unfair labor practice for an employer * * * (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *."

[12] The State Court of Appeals below found that picketing to compel an employer to coerce his employees to join a union is also unlawful under Ohio public policy and that this Court has approved the legality of such a state policy (R. 164). *Building Service Employees International Union v. Gazzam*, 339 U. S. 532. In two cases decided since the instant case, the Ohio Court of Appeals has affirmed such state policy. *Anderson v. Retail Clerks Local No. 698*, 30 Labor Cases ¶ 70158; *Cavett v. Machinists, District Lodge 34*, 30 Labor Cases ¶ 70161.

Moreover, the findings of the courts below also are that Petitioners engaged in secondary boycott activities, which are likewise proscribed by and unprotected by the National Labor Relations Act (R. 155-156, 165). See Section 8(b)(4)(A) and (B) of the Act. These findings are likewise amply supported by the testimony of record (R. 52-55).

Since then the picketing here involved was an unprotected and indeed proscribed activity under the National Labor Relations Act, there was no possible conflict between the policy of the federal act and the action of the state court in issuing an injunction against such picketing. See cases cited pp. 46-48, *supra*.[13] And if the National Board declines for policy reasons to act as here, the state court should be permitted to assume jurisdiction.

4. The Decided Cases Show that the State Court Had Jurisdiction to Proceed Here.

a. Court Decisions.

While, as already noted, this Court has itself not yet decided whether a state court may proceed where the National Board as a matter of policy declines jurisdiction, many state courts have dealt with that problem and, with minor exceptions, all have upheld the authority of the state court to act. For example, the Supreme Court of Utah recently decided the case of *Guss v. Utah Board*, 296 P. (2d) 733, 38 LRRM 2137, involving a union that had been certified by the National Board in 1952. When

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[13] As recently pointed out by a judge of the Ohio Court of Appeals, under the National Labor Relations Act picketing to compel an employer to designate a union as bargaining agent is an unfair labor practice (See Section 8(b)(2), *supra*, note 11) and is in *harmony with the Ohio* rule that such picketing is unlawful. *Cavett v. Machinists, District Lodge 34*, 30 Labor Cases ¶ 70161.

that union filed unfair labor practice charges against the employer in 1954, the Board dismissed those charges under its newly established jurisdictional standards. The union then filed charges with the state labor board which entered an order against the employer, who brought suit to review the question of whether the state board had jurisdiction. In an extremely well reasoned opinion the Utah state court held that the state board had jurisdiction for the following reasons:

a. The National Board has neither the time nor the money to administer the vast field entrusted to it and hence must select matters which it will handle on the basis of the effect upon national interests.

b. If the National Board determines that the matter is predominantly local, the interests affected must likewise be predominantly local and hence a matter for state regulation.

c. If the National Board declines to act and the state is prohibited from acting, a large segment of industrial relations is unregulated, contrary to the purposes of both federal and state acts, and the parties are left to self-help, which is disastrous to economy and internal peace.

d. There was no allegation in the case that either party was deprived of rights it might have obtained under federal law had the National Board taken jurisdiction, and there was no intimation that the National Board would have disposed of the case in a different way than the state board. No substantive conflict between the federal and state statutes was alleged nor did any appear as to the particular charges involved; i.e., discrimination against

union employees and refusal to bargain collectively.[14]

The Utah Supreme Court therefore concluded that there was no conflict with federal authority in the case and hence the state board was free to act.

The highest courts of several other states are in accord with the Utah Supreme Court. *Cain, Brogden & Cain v. Teamsters* (Tex.), 285 S. W. (2d) 942, 37 LRRM 2298 (injunction issued against secondary boycott picketing); *Garmon v. San Diego Building Trades Council* (Calif.), 291 P. (2d) 1, 37 LRRM 2233, *cert. granted*, 351 U. S. 923 (injunction against picketing to compel employer to sign a union-shop agreement); *Building Trades Council of Reno v. Bonito* (Nev.), 280 P. (2d) 295, 35 LRRM 2600 (injunction against listing plaintiff on unfair list in an effort to compel him to hire union help only). Several inferior courts are also in accord. *Hammer v. Textile Workers* (N. J. Superior Ct.), 111 A. (2d) 308, 34 LRRM 2812, 2819-2820; *Ringling Bros. v. Lewis* (N. Y. Sup. Ct.), 37 LRRM 2810 (injunction against picketing to compel employer to sign a union-shop contract); *Teamsters Local v. Merchandise Co.* (Ind. App.), 132 N. E. (2d) 715, 37 LRRM 2819 (injunction against picketing accompanied by misrepresentation); *Lee Mark Metal Manufacturing Co. v. Local 596* (Pa. Ct. Common Pleas, Phila. County), 38 LRRM 2219 (injunction against picketing accompanied by

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[14] While, as we have previously argued, we do not believe that in the circumstances here any more need be shown to establish state court jurisdiction than the fact that the National Board would decline for policy reasons to assert its jurisdiction, nevertheless, as we have already shown, in the instant case also the action of the state court was consistent with federal policy as set forth in the National Act. See *Weber v. Anheuser Busch*, 348 U. S. 468, 474; *Garner v. Teamsters Union*, 346 U. S. 485, 499-500.

threats); *School District v. Trades Council* (Cir. Ct., Ottawa County, Mich.), 37 LRRM 2232 (injunction against picketing at a construction site, the court holding that since the N. L. R. B. would not assert jurisdiction, plaintiffs must have some forum to turn to lest they be deprived of due process or equal protection of the laws. The court added that N. L. R. B. standards are notice to the profession that certain matters will not be heard by that body and to the extent that N. L. R. B. does not choose to assert jurisdiction there is no pre-emption.[15]

The cases relied upon by Petitioners at page 67, note 32 of their brief are in large measure distinguishable. To the extent they are not distinguishable, these decisions are based on the view that Section 10(a) of the National Act provides the only means of giving states authority within the purview of the National Act, and until there is a proper cession by the National Board to a State, the Federal Agency has exclusive jurisdiction. We shall demonstrate *infra*, pp. 56-57, that this position is untenable. Thus *Retail Clerks Local No. 1564 v. Your Food Stores*, 225 F. (2d) 659 (C. C. A. 10), simply held that a federal court judgment dissolving a state court injunction restraining picketing on the ground that the field had been pre-empted by the National Labor Relations Act was *res judicata* and could not be collaterally attacked in another state court action following the N. L. R. B.'s declination of jurisdiction. The court added by way of *dictum* a statement of the erroneous view that Section 10(a) of the National Act is mandatory and exclusive in effect. *Capital Service v.*

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[15] See also *N. L. R. B. v. Swift*, 130 F. Supp. 214 (E. D. Mo.), *aff'd. on other grounds* 233 F. (2) 226 (C. C. A. 8), where the federal court refused to interfere with a state court injunction granted against union picketing to compel the employer to force his employees to join the union, after the National Board had declined jurisdiction.

National Labor Relations Board, 204 F. (2d) 848 (C. C. A. 9) involved a company over which the Board had asserted jurisdiction, so that it was proper for the federal court at the Board's instance to enjoin a conflicting state court proceeding. The court's statement referred to by Petitioners (p. 67, note 32) cannot be considered therefore as passing upon the right of a state to act where the National Board declines jurisdiction altogether. *Graybar Electric Co. v. Automotive Union* (Mo.), 287 S. W. (2d) 794, 37 LRRM 2556, also cited by Petitioners, did not involve a case where the N. L. R. B. declined jurisdiction but rather a case where, as the Missouri Supreme Court held, the General Counsel of the Board dismissed charges of unfair labor practices on the merits. As for the decision of the circuit court of Michigan for Kent County in *Universal Car Company v. Machinists*, 35 LRRM 2087, likewise relied upon by Petitioners, it will be observed that subsequently another circuit court in Michigan held contrariwise to that court (*School District v. Trades Council*, Cir. Ct., Ottawa County, Mich., cited *supra*, p. 52). And the decision of the New York Supreme Court in *New York Board v. Wags Transportation System*, 130 N. Y. S. (2d) 731, 33 LRRM 2855, also referred to by Petitioners, was affirmed on appeal by the Appellate Division of New York only on the ground that there was no clear showing that the National Board would not have assumed jurisdiction. 284 App. Div. 883, 134 N. Y. S. (2d) 603. The New York State Labor Relations Board accordingly does not consider the state supreme court's decision as controlling in situations where it is clear that the National Board would not take jurisdiction, but on the contrary in such cases the New York Board does take jurisdiction. *Raisch Motors*, 35 LRRM 1631, 1632, note 2.

b. *State Labor Board Decisions.*

Seven state labor boards have considered the question of whether they will assert jurisdiction in cases where the National Board's jurisdictional standards are not met and therefore the National Board declines jurisdiction. All have held that in such cases they have jurisdiction:

(1) *Raisch Motors*, 35 LRRM 1631 (N. Y. State Labor Relations Board—automobile dealer involved); (2) *Walker Motors*, 36 LRRM 1290 (Mich. State Labor Mediation Board—automobile dealer); (3) *Ashland Motor Co.*, 37 LRRM 1116 (Wisconsin Employment Relations Board—automobile dealer);[16] (4) *Interstate Overall Service Inc.*, 37 LRRM 1431 (Mass. Labor Relations Comm.—overall cleaning company involved); (5) *Hilton Hotels*, 37 LRRM 1474 (Puerto Rico Labor Relations Board—hotel); (6) *Ideal Soap and Chemical Co.*, 38 LRRM 1043 (Pa. Labor Relations Board—dry cleaning supply business).[17] No state labor boards have taken a contrary position.

The reasons advanced by these boards as to why they have jurisdiction are worthy of note. The New York Board, for example, relied upon the absence of any potential conflict between it and the National Board. It added also that since labor disputes have an immediate and

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[16] The Wisconsin Board however does not take jurisdiction in a case where the National Board has asserted jurisdiction but has dismissed a representation proceeding on the ground that the requested bargaining unit is inappropriate because it includes only one employee. *Operating Engineers*, 38 LRRM 1431. In those circumstances the National Board's determination takes on the character of a decision like that involved in *Bethlehem Steel*, 330 U. S. 767, 774-775.

[17] The seventh board, which has also asserted jurisdiction in these circumstances, is the Utah Labor Relations Board. See *Guss v. Utah Board*, discussed *supra*, pp. 49-51, and involving a company which manufactured equipment for the Air Force.

direct effect upon the local community, they must be subject to state regulation or they would be totally unregulated in cases where the National Board declines jurisdiction. The state board also stated its opinion to be that when the National Board exercised the discretionary power given it by Congress to decline jurisdiction, Congress never intended in that circumstance to prevent the states from taking necessary steps to protect their own safety, health and welfare.

The reasoning of the Massachusetts and Puerto Rico Boards is similar to that of the New York Board, except that the Puerto Rico Board also made the point that it is precisely in the area of small business abandoned by the N. L. R. B. where labor organization is least developed and state intervention is most necessary.

It should also be emphasized that, as at least one of the state boards pointed out,[18] if Congress expressly excluded certain cases from the scope of the National Act, the states would be at liberty to act.[19] Consequently, the result must be the same where Congress, instead of doing that expressly, delegates the power to a federal agency to decline to act in given cases and the agency exercises that power. If this were not true, the authorized delegation of its power by Congress would have greater effect than the direct exercise of authority by Congress. And as pointed out by William Isaacson, General Counsel of the Amalgamated Clothing Workers of America, writing in the American Bar Association Journal, and speaking of cases where the National Board has declined jurisdiction

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[18] Puerto Rico Board in *Hilton Hotels*, 37 LRRM 1474.

[19] *Allen Bradley Local v. N. L. R. B.*, 315 U. S. 740 and *International Union v. Wisconsin Employment Relations Board*, 336 U. S. 245 make this clear.

"If state authority is foreclosed in those areas where the Federal Government has spoken because of the need for centralized administration and uniformity of rule, *there would seem to be no valid policy basis for excluding state action where the Federal Government speaking through its designated agency, has indicated that there is no need for any such centralized regulation or uniform control.*" (Emphasis Supplied) Isaacson, *Federal versus State Jurisdiction*, 42 A. B. A. J. 415, 484.

5. If State Court Jurisdiction is Barred under the Circumstances of This Case the Necessary Effect Is to Compel the National Board to Abandon Its Jurisdictional Standards and Accept Jurisdiction in All Cases Covered by the National Labor Relations Act Regardless of How Minor the Impact on Interstate Commerce. The Result of This Would Be to Cause a Frustration of the Proper Administration of the National Labor Relations Act.

As previously explained the National Board declines jurisdiction in many cases where it believes the impact upon interstate commerce is minor. The reasons for this declination of jurisdiction are, as the Board has pointed out, that it better effectuates the purposes of the Act and promotes the prompt handling of major cases. Moreover this Court has approved the Board's declining to take jurisdiction in some cases, saying:

"Even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, *the Board sometimes properly declines to do so,* stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case." (Emphasis supplied.) *N. L. R. B. vs. Denver Bldg. & Const. Trades Council,* 341 U. S. 675, 684.

See also *N. L. R. B. v. Indiana and M. Electric Co.,* 318 U. S. 9, 18, where this Court noted that the Board has

wide discretion in the issuance of complaints and is not required to move on every charge, but is merely enabled to do so. And see also *Brooks v. N. L. R. B.*, 348 U. S. 96, 104, note 16, where the Court noted the existence of the Board's 1954 jurisdictional standards and noted further that these standards "would place this case, if now brought, outside them." The federal Court of Appeals have likewise upheld the power of the Board, for policy reasons, to establish jurisdictional standards and decline to assert jurisdiction in cases not meeting those standards. *Haleston Drug Stores v. N. L. R. B.*, 187 F. (2d) 418 (C. C. A. 9), *cert. den.* 342 U. S. 815; *Optical Workers Union v. N. L. R. B.*, 227 F. (2d) 687 (C. C. A. 5), *reh'g. den.* 229 F. (2d) 170, *cert. den.* 351 U. S. 963; *Progressive Mine Workers v. N. L. R. B.*, 189 F. (2d) 1, 4-5 (C. C. A. 7), *cert. den.* 342 U. S. 868.

But if a state is precluded from acting in circumstances where the National Board declines jurisdiction, this Court, despite its approval of such self-denial by the National Board will in effect compel it to abandon its jurisdictional standards and take jurisdiction in all cases falling within the ambit of the National Act. Otherwise innocent parties who are victims of unlawful acts will have no remedy. On the other hand it is also obvious that an impossible situation will have been created. The Board with its limited budget and personnel cannot take jurisdiction in all cases and if it finds itself bogged down with many cases where the impact upon commerce is small, that will hinder it from carrying out the policies of the Act in much more important cases where really serious threats to interstate commerce are presented and frustrate the proper administration of the National Act.

Another practical consequence of the Court's denying state court jurisdiction here will be that the Board will be

compelled to abandon its policy of declining to act on unfair labor practice charges where an arbitral forum is available or an arbitration award has been made. *U. E. v. Worthington Corp.*, 38 LRRM 2507, 2510 (C. C. A. 1); *Spielberg Mfg. Co.*, 112 NLRB 1080, 36 LRRM 1152. As before noted, where pre-emption applies, it applies to arbitration tribunals as well as state courts.

These practical considerations obviously are the reason why the Board has taken the position, announced to this Court at p. 11 of its Memorandum filed in the *Laburnum* case, *supra*, p. 36, that

> "It [the Board] has, however, as a matter of practice repeatedly refrained from intervening in any way in situations where the States, despite the absence of any cession agreement, have taken action with respect to industries over which the Board as a matter of policy declines to take jurisdiction. See *Almeida Bus Service*, 99 N. L. R. B. 498, 500-501.[22]

"[22] The Board's practice in this respect is reflected in its action in *National Labor Relations Board v. New York State Labor Relations Board*, 106 F. Supp. 749 (S. D. N. Y.). There the Board sought to enjoin the New York State Labor Relations Board from taking jurisdiction over certain taxicab companies over which the Board has asserted jurisdiction. While the case was pending, the Board reconsidered its jurisdictional policy with respect to taxicab companies and concluded that it would refrain from asserting jurisdiction over the type of companies involved in the action against the New York Board. Following this change of policy, the National Board entered into a stipulation with the State Board dismissing the action in the district court."

And note also that in the instant case the Board's brief takes the position that despite the absence of a cession

agreement, where the Board declines jurisdiction for policy reasons, a state court may act.

We submit that the foregoing practical considerations inevitably lead to the conclusion that in circumstances where the National Board declines jurisdiction, the state may act.

6. Erroneous Arguments of Petitioners.

a. Petitioners contend (Pet. Br., pp. 31-32, 59-83) that Section 10 (a) of the National Labor Relations Act provides the only means by which states may assert jurisdiction in cases falling within the purview of that Act. Section 10 (a) provides as follows:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce.[20] This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to

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[20] While the original National Labor Relations Act made this power of the Board to prevent unfair labor practices "exclusive," the Taft-Hartley amendments of 1947 omitted the word "exclusive." As pointed out by this Court in *U. A. W. v. Wisconsin Employment Relations Board*, 351 U. S. 266, 271, note 8, the omission was explained in the conference report (*H. Rept. No. 510*, 80th Cong., 1st Sess., p. 52; *Legislative History of the Labor Management Relations Act, 1947* (Gov't. Print. Off., 1948), p. 556) as being in recognition of (a) the jurisdiction vested in the federal courts by Sections 10 (j) and (l) of the Act to grant temporary injunctions against alleged unfair labor practices and (b) the provisions of Section 303 of the Act making unions suable in the courts in various secondary boycott situations. See also *Amazon Cotton Mills Company v. Textile Workers Union*, 167 F. (2d) 183, 187 (C. C. A. 4), which gives the same explanation as to the omission of the word "exclusive" and adds a reference to Section 208 of the Act, allowing the Attorney General to seek injunctions against strikes and lockouts in national emergency situations.

such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

Petitioners' argument is that only by a cession agreement between the N. L. R. B. and a state agency as provided in Section 10(a) may a state enter the field covered by the federal act. We submit that for the reasons which follow this argument is untenable.

(1) The proviso in Section 10(a) is limited by its terms to cases of cession agreements between the N. L. R. B. and state agencies. It assumes a situation in which the National Board asserts jurisdiction and provides the terms and conditions under which the National Board may cede that asserted jurisdiction to a state agency. But nowhere does it purport to deal with cases in which the National Board declines jurisdiction for policy reasons. In other words, Congress has delegated to the Board a broad field of jurisdiction under the National Labor Relations Act. But it is plain from Section 10(b) of the Act that the Board, while it has "power" to act in unfair labor practice charges, is not required to do so. *N. L. R. B. vs. Indiana & M. Electric Co.*, 318 U. S. 9, 18. When the Board declines jurisdiction altogether, it leaves the entire area free to state regulation and the Section 10(a) proviso has no application to that situation. Rather, that proviso applies only to cession by the Board to a state agency of the jurisdiction which the Board retains and not that which

it abandons altogether. Since that is true, there is no basis for implying as Petitioners suggest (Pet. Br., p. 68), that by specifying cession as a method whereby the states may acquire jurisdiction over matters committed to the Board, Congress thereby excluded the states from asserting jurisdiction under any other circumstances.

(2) Petitioners argue (Pet. Br., pp. 31-32) that the proviso to Section 10(a) would have been unnecessary if the Board's declination of jurisdiction in certain areas removed those areas from the Act's coverage, because cession would then be possible only in areas not "predominantly local in character" and the proviso itself allegedly contains an express prohibition against cession to the states in these circumstances. See also Petitioners' Brief, pages 67-68.

We submit that this argument is fallacious. First, we make no contention that the Board's declination of jurisdiction removes the cases so declined from the Act's coverage. The Board's reasons for declining jurisdiction are the policy ones set forth *supra*, page 46, and not that such cases do not fall within the Act's coverage. Elsewhere in their brief (p. 29) Petitioners recognize this, citing *East Newark Realty Corp.*, 115 NLRB No. 75, 37 LRRM 1328. The hotel industry is also an excellent example of an industry many of whose operations have a very strong impact upon commerce and yet for policy reasons the Board has constantly declined to assert jurisdiction. *Hotel Association of St. Louis*, 92 NLRB 1388, 27 LRRM 1243; *All Hotel Members of Miami Beach Hotel Association*, 36 LRRM 1447. Second, contrary to Petitioners' statement, the proviso does not forbid cession in cases of industries not "predominantly local in character." The prohibition is only against cession agreements with respect to "mining,

manufacturing, communications, and transportation" industries except where "predominantly local in character." On the other hand in other industries, such as for example large retailing, cession is permitted even though not "predominantly local in character" and even though in those industries the Board does assert jurisdiction. See Appendix B, pages 86-87, *infra*.

(3) As pointed out by the Ninth Circuit, in discussing the discretionary authority of the Board to decline to exercise jurisdiction in various cases:

> "By the express language of Section 10(a) the Board was and still is *empowered* (not directed) to prevent persons from engaging in unfair labor practices affecting commerce. *Its discretionary authority in respect of its assertion of jurisdiction was never, so far as we are informed, questioned under the act as it existed prior to 1947.* In *NLRB vs. Indiana & M. Electric Co.*, 318 U. S. 9, 18, 19, 63 S. Ct. 394, 400, 87 L. Ed. 579, the Court noted that 'The Board has wide discretion in the issue of complaints. * * * It is not required by the statute to move on every charge; it is merely enabled to do so.' [2] Consult also *Amalgamated Workers v. Consolidated Edison Co.*, 309 U. S. 261, 265, 60 S. Ct. 561, 84 L. Ed. 738. *The Board itself, without judicial challenge, acted on the assumption that it could, for reasons of policy or for budgetary or other reasons, decline to issue an unfair labor practice complaint,* or to dismiss a complaint after issuance without determining the existence of an unfair practice, *if in its reasoned judgment the policies of the act*

"[2] For the basis of this holding see § 10(b), which read: 'Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, * * * shall have power to issue * * * [a] complaint.' This verbiage remains unchanged in the section as it now exists." (Emphasis supplied) *Haleston Drug Stores v. N. L. R. B.*, 187 F. (2d) 418, 421, *cert. den.* 342 U. S. 815.

would be best served by that course. Of this assumption and practice one cannot doubt that Congress was fully cognizant."

And as stated by the Fifth Circuit, in a recent case also upholding the Board's discretionary authority to decline jurisdiction in various cases:

> "The National Labor Relations Board, even before the Taft-Hartley amendments gave it the task of policing a whole new set of unfair labor practices, was never able to assume its full jurisdiction. *Before 1950, its declinations of jurisdiction were avowedly on a case-by-case basis,*[21] and the Petitioners admit that this was within the Board's discretion. However, while these decisions were not made pursuant to any announced policy, they followed a course that all who were interested could soon easily predict." (Emphasis Supplied). *Optical Workers Union vs. NLRB*, 227 F. (2d) 687, 691, *reh'g. den.* 229 F. (2d) 170, *cert. den.* 351 U. S. 963.

It would seem therefore that Congress was fully aware, when it enacted Section 10(a) in 1947, of the Board's practice, for policy reasons, to decline to assert jurisdiction in many cases. Petitioners concede this (Pet. Br., pp. 30-31). See also the testimony of Chairman Herzog and General Counsel Denham of the Board before the Joint Committee on Labor Management Relations, established by Title IV of the Labor Management Relations Act, 1947, in which Messrs. Herzog and Denham reviewed at length the Board's practice in this regard under the original National Labor Relations Act prior to its amendment in 1947. *Hearings before Joint Committee on Labor*

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[21] See also Board Memorandum to this Court in the *Laburnum* case, where the Board stated (p. 5) that prior to 1950 its declinations of jurisdiction were on a case-by-case basis. The same statement appears in the Board decision in *Breeding Transfer Co.*, 110 NLRB 493, 35 LRRM 1020, 1021.

Management Relations, 80th Cong., 2nd Sess., pp. 1121, 1155-1156, 1157-1165.[22] Since "there is simply no evidence of a congressional purpose to take from the Board the power of dismissal on grounds having to do with the effectuation of the policy of the Act" (*Haleston Drug Stores vs. N. L. R. B.*, 187 F. (2d) 418, 422 (C. C. A. 9)), Congress' approval of the Board's practice is to be presumed. See in this connection Senator Taft's criticism of General Counsel Denham for the latter's desire to take jurisdiction over enterprises, no matter how small, if they affected commerce in whatever small degree, and his approval of the Board's contrary policy. *Hearings before Senate Committee on Labor and Public Welfare on S. 249*, 81st Cong., 1st Sess., p. 177.[23] There is also simply no reason to suppose that by Section 10(a) Congress was disapproving the correlative practice of state courts in assuming jurisdiction in that situation.

Petitioners, while conceding that Congress was aware when it amended the Act in 1947 of the Board's practice of declining to assert jurisdiction in many cases (Pet. Br., pp. 30-31), argue that Congress did not narrow the Act's coverage to conform to the limitations imposed by the Board on the exercise of its jurisdiction (*Id.*). While it is not clear what follows from this argument, it should be pointed out once again that the Act's coverage and the

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[22] See likewise the following, showing Congress' awareness of the Board's practice in this regard subsequent to 1947: *Report of Joint Committee on Labor Management Relations, S. Rept. 986*, 80th Cong., 2nd Sess., Part 3, pp. 11-13; *S. Rept. 99*, 81st Cong., 1st Sess., Part 1, p. 40; *H. Rept. 1852*, 81st Cong., 2nd Sess., p. 10; *N. L. R. B. 16th Annual Report (1952)*, pp. 15-39, 256-257.

[23] Other affirmative indications of approval by Congress of the Board's practice may be seen in *Hearings Before Senate Committee on Labor and Public Welfare on S. 249*, 81st Cong., 1st Sess., pp. 175-176; *H. Rept. 1852*, 81st Cong., 2nd Sess., p. 10.

extent to which the Board asserts jurisdiction are two different things. Because of the vagaries of business operations and the constant changes in our economy, Congress may want the National Board to have the authority to govern labor relations in all industries which may be reached under the Commerce Clause, but for the practical reasons spelled out by the Board in *Breeding Transfer Company*, 110 NLRB 493, 35 LRRM 1020, the Board may conclude that it should not assert jurisdiction in all such cases. And the Board may from time to time, as it has, change its views on how much of its allowable jurisdiction it should exercise. But the failure of Congress to restrict the Act's coverage to cases where the National Board asserts jurisdiction does not mean that Congress has thereby disapproved the states' stepping in to act where the National Board declines to do so.

(4) The purpose of the proviso to Section 10(a)—to allow cession agreements with states—was made necessary by this Court's decision in *Bethlehem Steel Co. vs. N. Y. State Labor Relations Board*, 330 U. S. 767, which appeared to outlaw such agreements under the original National Labor Relations Act. See *S. Rept. 105*, 80th Cong., 1st Sess., Part 1, p. 6 and Part 2, p. 38, *Legislative History of the Labor Management Relations Act, 1947* (Gov't. Print. Off., 1948), pp. 412, 500. This Court has recognized that this was the purpose of the proviso to Section 10(a). *Algoma Plywood & Veneer Co. vs. Wisconsin Employment Relations Board*, 336 U. S. 301, 313. But what was involved in *Bethlehem Steel*, as that case makes clear, was the problem of concurrent jurisdiction by the National and state labor boards over the same controversy. What Congress sought to do in Section 10(a) was provide a means whereby the National Board, although it possessed and

asserted jurisdiction in particular cases, might cede that jurisdiction to a state agency. The issue here is totally different, as this Court recognized in *Bethlehem Steel*, saying (330 U. S. at p. 776):

> "The election of the National Board to decline jurisdiction in certain types of cases, for budgetary or other reasons, presents a different problem which we do not now decide."

(5) As appears both from the language of the proviso to Section 10(a) and from its legislative history cession is allowed only where the state statute involved conforms to national policy. *H. Rept.* 510, 80th Cong., 1st Sess., p. 52, *Legislative History of the Labor Management Relations Act*, 1947, p. 556; *S. Rept.* 105, 80th Cong., 1st Sess., Part 1, p. 26, *Legislative History of the Labor Management Relations Act*, 1947, p. 432. What Congress was seeking therefore was to promote a uniform policy throughout the whole nation. The National Board has been unable to conclude cession agreements with any state agency because of failure to satisfy the statutory requirement that the relevant state law must not be "inconsistent" with the corresponding provision of the National Act or have received a construction "inconsistent therewith." *Board Memorandum* in *Laburnum* case, p. 3, referred to *supra*, p. 63. But this can hardly mean that where the Board itself declines jurisdiction in particular cases the state is powerless to act. The total absence of regulation in such cases would appear to conflict with the basic purpose of the National Act to promote industrial peace by means of government intervention. See Section 1 of the National Labor Relations Act.

As for Petitioners' argument (Pet. Br., p. 77) that the proviso to Section 10(a) acts as a spur to the states to bring their laws into conformity with the National Act,

we agree that this is so to the extent that the Board asserts jurisdiction in particular cases. But this is completely immaterial in cases where the Board declines jurisdiction, for then if the state acts there can be no conflict between the federal and state governments, and to preclude the states from acting leaves the parties in an economic jungle where might is right.

Petitioners argue (Pet. Br., pp. 69-72) that to permit the states to act where the Board declines jurisdiction defeats various objectives of the Taft-Hartley Act, such as ridding the labor movement of Communist leadership, fostering independent unions, allowing freedom of speech, and the like. Aside from the fact that these objectives are not being achieved in any event where the Board declines jurisdiction, it is plain that none of these matters is involved in the subject case. What is involved is a situation in which the union picketed Respondent's places of business for a purpose unlawful under both federal and state laws and the question of whether Respondent shall be remediless in that situation. It is unnecessary for this Court to decide other cases, conjured up by Petitioners, where there may be a conflict between state action and federal policy as enunciated in the Act.

(6) Petitioners argue that uncertainties result from allowing the state to take jurisdiction where the Board declines same, because the Board's jurisdictional standards change from time to time (Pet. Br., pp. 74-77). But in the first place, the Board's jurisdictional standards are not changed as frequently as Petitioners would have this Court believe. They were first codified in 1950 and not revised until July, 1954. Since that time they have remained static. Secondly, what Petitioners complain about is the inevitable consequence of applying fixed and pre-

determined standards to the operations of the Nation's various business establishments. In the dynamic field of labor relations it is necessary that from time to time the Board revise its jurisdictional standards in a constant effort to reach all operations having a truly substantial impact on our economy. At the same time the Board believes that it creates a greater degree of certainty for employers and unions to know in advance through its fixed standards what the cases are over which it will or will not assert jurisdiction. Merely because those standards may change hardly means that therefore the states should be precluded from asserting jurisdiction over various enterprises during a period when the National Board has announced that it will not take jurisdiction over them.

(7) That Section 10(a) was not intended to have the effect suggested by Petitioners is further shown by the following debate on the conference report which took place between Congressman Kersten and Congressman Hartley, chairman of the House Conferees and co-author of the bill.

"Mr. Kersten of Wisconsin. Mr. Speaker, will the gentleman yield?

"Mr. Hartley. I yield.

"Mr. Kersten of Wisconsin. I wish to compliment the gentleman on the very fine exposition he is making of the conference report. I would like to ask the gentleman about that portion which pertains to the validity of State laws. Wisconsin and other States have their own labor relations laws. We are very anxious that disputes be settled at the State level insofar as it is possible. Can the gentleman give us assurance on that proposition, so that it is a matter of record, that that is the sense of the language and of the report?

"Mr. Hartley. *That is the sense of the language of the bill and of the report. That is my interpretation of the bill, that this will not interfere with the State of Wisconsin in the administration of its own laws. In other words, this will not interfere with the validity of the laws within that State.*

"Mr. Kersten of Wisconsin. *And it will permit as many of these disputes to be settled at the State level as possible?*

"Mr. Hartley. *Exactly.*" (Emphasis Supplied) 93 Cong. Rec. 6540, *Legislative History of the Labor Management Relations Act, 1947*, p. 883.

(8) It is the sheerest sort of guesswork for Petitioners to contend (Pet. Br., pp. 77-79) that if Congress had intended to allow the parties another remedy where the National Board declines to act, it would have vested jurisdiction in the federal courts. Even in cases where the National Board would assert jurisdiction, this Court has allowed state court remedies. See *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656, 665-669; *U. A. W. v. Wisconsin Employment Relations Board*, 351 U. S. 266. Moreover, Petitioners' argument overlooks completely the basic principle that the subject of labor relations falls within state power and control except as Congress has plainly manifested its intent to exclude the states. See cases cited *supra*, pp. 17 and 18.

b. Petitioners' argument (Pet. Br., pp. 79-83), based upon the failure of Congress to repeal the proviso in Section 10(a), is equally untenable. We have already shown that the Section 10(a) proviso was intended to deal with cases in which the N. L. R. B. asserts jurisdiction and not to those in which it declines jurisdiction. Accordingly failure to repeal such proviso shows at most only that Congress does not wish the N. L. R. B. to enter

into cession agreements with a state unless the state law conforms to national policy in all respects.

Moreover, Petitioner relies in part upon an early and preliminary report of the Joint Committee on Labor Management Relations (*S. Rept. No. 986*, 80th Cong., 2nd Sess., Part 1, pp. 30-31). See Petitioners' Brief, pp. 80-81. But when following public hearings, that Committee made its final report, it said:

> "The committee believes that small local businesses, retail and service establishments, should not be subject to the Act. * * * The most obvious approach, if the jurisdiction of the Board is to be clearly defined, is a mathematical one. The number of persons employed and the volume in dollar value of sales to out-of-state customers are facts which may be ascertained with accuracy. If such a limitation is desirable, the committee recommends use of number of employees in combination with interstate sales." (*S. Rept. 986*, 80th Cong., 2nd Sess., Part 3, pp. 14-15.)

And soon thereafter the Board on its own motion adopted mathematical jurisdictional standards (Appendix A, *infra*, pp. 79-80). It is significant that Congress has not since legislated upon this subject, so that if any inference at all is to be drawn from Congressional inaction, it is that Congress has acquiesced in the Board's establishment of jurisdictional standards and in the state courts assuming jurisdiction in those circumstances.

In any case the inferences Petitioner suggests may not be drawn from "incompleted steps in the legislative process." *Wong Yang Sung v. McGrath*, 339 U. S. 33, 47.

In 1949 the Senate, following lengthy hearings before its Labor Committee (*Hearings on S. 249*, 81st Cong., 1st Sess.) and both majority and minority reports of that Committee (*S. Rept. 99*, 81st Cong., 1st Sess., Parts 1

and 2), passed a bill which would have amended the National Labor Relations Act extensively. 95 Cong. Rec. 8717. This bill, *among many other things*, would have eliminated the proviso to Section 10(a). See *S. Rept. 99*, 81st Cong., 1st Sess., Part 2, p. 75.[24] The House in 1949 considered a bill to repeal the Act (*H. R. 2032*, 81st Cong., 1st Sess.) and its Labor Committee filed a report thereon (*H. Rept. 317*, 81st Cong., 1st Sess., 95 Cong. Rec. 3146), but such bill was recommitted to Committee (95 Cong. Rec. 5597) and the House never took any action on the Senate-passed bill. Again in 1954 the Senate Labor Committee, after extensive hearings in 1953 (*Hearings on S. 225 et al.*, 83rd Cong., 1st Sess.), reported a bill (*S. 2650*, 83rd Cong., 2nd Sess.) to amend the Act *in many respects*, including an amendment specifically permitting the states to act where the National Board declines jurisdiction. *S. Rept. 1211*, 83rd Cong., 2nd Sess., p. 28. At the same time this bill left untouched the proviso to Section 10(a) (*S. Rept. 1211*, 83rd Cong., 2nd Sess., p. 33), thus showing that the Committee did not believe that Section 10(a) itself precluded a state from taking jurisdiction in a case where the National Board declined jurisdiction. S. 2650, however, was recommitted to Committee, 100 Cong. Rec. 6203. The House Labor Committee also held hearings in 1953 on various proposals to amend the Act (*Hearings pursuant to H. Res. 115*, 83rd Cong., 1st Sess.), but never reported a bill.

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[24] The bill, as passed by the Senate, had been recommended in the minority report of Senators Taft, Smith, and Donnell of the Senate Labor Committee on S. 249. *S. Rept. 99*, 81st Cong., 1st Sess., Part 2. See 95 Cong. Rec. 8717. Significantly, such minority report (p. 8) expressed the view that

> "We believe it desirable that in those border-line cases where interstate commerce is only remotely affected and the industry is essentially local in character the National Board should not take jurisdiction in any event."

Aside from the bill passed by the Senate in 1949, at no time after 1947 did either House pass any bill to amend the National Labor Relations Act, except for the non-controversial bill which Congress did enact in 1951 the major purpose of which was to eliminate the requirement for union shop authorization elections before an employer and a union might agree to a union shop provision in a collective bargaining contract. See *Public Law 189*, 82nd Cong., 1st Sess., Ch. 534, approved October 22, 1951, 65 Stat. 601.

In the above circumstances where the most that ever happened was that one House of Congress once passed a bill that would have eliminated the proviso to Section 10(a) and a Committee once reported a bill that would have specifically permitted the States to act when the National Board declines jurisdiction (but left Section 10(a) unchanged), and in each case this matter was just one of a whole series of proposed amendments to the Act, no inference in favor of Petitioners' construction of Section 10(a) can be drawn. *Cf. Wong Yang Sung v. McGrath*, 339 U. S. 33, 47-48, where, speaking of an attempt specifically to exempt the Immigration Service from the Administrative Procedure Act, this Court said that no inference could be drawn

> "from the Department's request for legislative clarification, from the congressional committees' willingness to consider it, or from Congress' failure to enact it."

c. Petitioner relies (Pet. Br., p. 37) upon *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U. S. 62, and particularly upon the following paragraph in that case:

> "The industrial relations between the company and its employees nonetheless affect interstate com-

merce and come within the field occupied by the National Labor Relations Act, as amended. The Labor Board is but an agency through which Congress has authorized certain industrial relations to be supervised and enforced. The Act goes further. The instant employer, employees and union are controlled by its applicable provisions and all courts, state as well as federal, are bound by them." *Id.*, p. 74.

But, of course, the words in this Court's opinion are to be read in the light of the facts of the case under discussion.[25] All that that case held is that a state court may not enjoin peaceful union picketing protected by Section 7 of the National Labor Relations Act, on the ground that the Union was not in compliance with Sections 9(f), (g) and (h) of the Act, requiring unions to file certain data with the Secretary of Labor and non-Communist affidavits with the Board. There was no question but that the employer in the case affected commerce and came within the Board's jurisdictional standards. 351 U. S. at p. 65. And the Court made it quite clear that if the Union had in fact violated the Act, its noncompliance with Sections 9(f), (g) and (h) would not have precluded the Board from proceeding against it. 351 U. S. at p. 70, note 5. The effect of noncompliance was simply to deny the Union access to the Board's processes. *Id.* at pp. 69-70, 73, 75.

The case here is totally different because the employer's business does not meet the Board's jurisdictional

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[25] See *Armour v. Wantock*, 323 U. S. 126, 132-133 where the Court said:

> "It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court. General expressions transposed to other facts are often misleading."

standards and the Board would therefore decline jurisdiction, whether of an unfair labor practice charge against the employer or one against the union. Moreover, here the union's activity, unlike that in the *Arkansas Oak Flooring* case, was not protected by the Act, but was indeed proscribed by it.

We submit that the Court did not intend by the foregoing general expression in the *Arkansas Oak Flooring* case to decide the problem now posed in this case and on which this Court had carefully reserved decision in two recent cases. *Kinard, supra,* pp. 32 and 33.[26] We further submit that for the reasons previously detailed, where the National Board decides that it would not effectuate the policies of the Act to go into certain areas, there is no basis in logic or authority for holding that the National Act in and of itself pre-empts such areas. This is particularly true in the light of the fact that the Act is not self-generating, but requires the filing of a charge before the Board may act, and the Board even then has discretionary authority to refuse to proceed. Section 10(b) of the Act; *N. L. R. B. v. Indiana & M. Electric Co.*, 318 U. S. 9, 18.

d. Petitioners, citing Section 14(a) of the National Labor Relations Act and Sections 301 and 303 of the Labor Management Relations Act, 1947, appear to argue that since those sections are operative whether or not the Board asserts jurisdiction in a given case, therefore in

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[26] The same is true of the general expressions of this Court to be found in *Amalgamated Ass'n. etc. v. Wisconsin Employment Relations Board*, 340 U. S. 383, 397-398, also relied upon by Petitioners (Pet. Br., pp. 65-66). That case struck down a Wisconsin Public Utility Anti-Strike Act providing for compulsory arbitration. The utility company there involved was one over which the National Board exercised jurisdiction. 340 U. S. 383, 392, note 14.

the instant case the state court has no jurisdiction to enjoin the picketing involved, even though the National Board would decline jurisdiction (Pet. Br., pp. 38-40). It will be noted, however, that the National Board has nothing to do with the administration of the cited sections. Its action or inaction in no way determines whether such sections apply in given circumstances. And indeed so far as Section 14(a) is concerned, it contains a clear expression by Congress that the subject matter covered by it is pre-empted by Congress to the exclusion of the states.

In cases such as that at bar on the other hand, involving unlawful union picketing, assuming that interstate commerce is affected, the National Board has discretionary authority to proceed or not proceed. The administration of the act with respect to unfair labor practices is in its hands. Only through its action can an employer or union obtain relief against unfair labor practices. And if it decides for policy reasons that it will not enter a particular case, it would appear to follow logically that the states are not excluded from that case.

PETITIONERS PROPOSE AN UNCONSTITUTIONAL INTERPRETATION OF THE ACT CONTRARY TO THE DECISIONS OF THIS COURT AND COMPLETELY FAIL TO JUSTIFY THE DENIAL OF DUE PROCESS THAT WOULD RESULT.

We have demonstrated at considerable length that denial of the right of the states to exercise their inherent jurisdiction in this area where the Board has refused to assert federal jurisdiction thus negating any potential conflict, as petitioners propose, would lead to the creation of an intolerable jural vacuum in which due process of law would be denied. Petitioners recognize that this is

in fact the inevitable result of the position they urge upon the Court in this case, but they dismiss the whole problem with a casual brush-off equivalent to "c'est la guerre." (Petitioners' Brief, paragraph E, pp. 10-11; p. 21; paragraph No. 7, p. 77; paragraph No. 9, p. 79.)

Thus, petitioners recognize that parties (employer, employee, and union alike) over whom the Board declines to assert jurisdiction "are left without a remedy." They might have added that such parties are also left without a day in court, an opportunity to be heard, a chance for judicial review, or any other essential element of due process. But, say petitioners, this is not Congress' fault; "that result is attributable only to the states" who failed to fulfill "Congress' hope and anticipation" that they would cure the defects in its legislation by passing consistent little Taft-Hartley Acts so that the Board could thus peddle portions of its jurisdiction through numerous section 10(a) cession agreements (Br. pp. 10, 21, 22). Petitioners proclaim that if the states had passed such laws

> "there could be no room for the argument that the Board's declination to assert jurisdiction leaves anyone without remedy." (Pet. Br. p. 10, emphasis added.)

This could be true, they assert, because if such laws had been passed, the Board *could have* executed Section 10(a) cession agreements with them and

> "had the Board thus ceded its jurisdiction, there could have been no room for the argument that the Board's declination leaves parties remediless." (Pet. Br. p. 79, emphasis added.)

First, we might mention the obvious by noting that since none of petitioners' suggested "ifs" came to pass,

there definitely does remain abundant "room for the argument" that due process would be denied and a jural vacuum would be created by adoption of petitioners' theories. The propriety of our due process argument follows as a necessary result of petitioners' own admissions (Pet. Br. p. 22).

Second, before petitioners' proposed method of curing the constitutional defect they seek to read into the federal Act could become effective, it would be necessary for *all* 48 states and *all* territories to enact such laws, or the fatal void would continue to exist at least partially. In view of the fact that no state or territory whatsoever has so acted and no cession agreements have ever been made in the decade since the passage of the Act, it would seem that the "hope and anticipation" which petitioners ascribe to Congress was ill-advised.

Third, we submit that the constitutionality of congressional legislation, whether it satisfies the constitutional requirement of due process, cannot be made to depend on the forlorn hope that the states will unanimously enact curative state laws. Nor can constitutional shortcomings in such legislation be waived or excused because the states declined to effect the rescue.

Fourth, the prior decisions of this Court holding the Act valid were reached specifically because the Act did not permit any such judicial vacuum or denial of due process. The void which petitioners try so hard to justify by attributing it to state inaction only exists if petitioners' erroneous theory of total pre-emption is adopted.

Thus, only by the exercise of state jurisdiction in the area abdicated by the Board will all federally guaranteed rights be fully protected. Moreover, this is an historic, recognized method of doing so. In *Amalgamated Clothing*

Workers v. Richman, 348 U. S. 511, the union sought to induce the federal courts to interfere with Ohio's exercise of jurisdiction in a labor relations case because "federal rights will not be adequately protected in the state courts." This court rejected that contention noting that historically Congress "in the main relied on the adequacy of the state judicial systems to enforce federal rights." The court further noted that in revising the Judicial Code in 1948 Congress had expressed its "continuing evidence of confidence in the state courts."

Petitioners' contention that state procedures must be denied because federal rights will suffer has thus been specifically refuted by this Court in the *Richman* case. If federal rights were to suffer in the area abdicated by the Board, it would be by denial of state jurisdiction, not by its exercise. The only tribunal available to protect such rights is the state court, which must do so, "subject to review by this court." *Amalgamated Clothing Workers v. Richman, supra.*

CONCLUSION.

It is respectfully submitted that the judgment below should be sustained.

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APPENDIX A.

N. L. R. B. Jurisdictional Standards—1950.

National Labor Relations Board

October 6, 1950 No. 342

N. L. R. B. Clarifies and Defines Areas in Which It Will and Will Not Exercise Jurisdiction

"The National Labor Relations Board today announced the establishment of standards which will govern its exercise of jurisdiction under the Taft-Hartley Act.

"The various 'yardsticks' which will be used by the Board in future cases involving all enterprises were set forth in eight unanimous decisions issued simultaneously. Pointing out that these standards 'reflect, in large measure, the results reached in the Board's past decisions disposing of similar jurisdictional issues,' the Board said:

> " 'The time has come when experience warrants the establishment and announcement of certain standards which will better clarify and define where the difficult line can best be drawn.
>
> " 'The Board has long been of the opinion that it would better effectuate the purposes of the Act, and promote the prompt handling of major cases, not to exercise its jurisdiction to the fullest extent possible under the authority delegated to it by Congress, but to limit that exercise to enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce. This policy should, in our opinion, be maintained.'

"The Board thereby reiterated its policy of not exercising jurisdiction, despite its power to do so, over business operations so local in character that a labor dispute would be unlikely to 'have a sufficient impact upon interstate

commerce to justify an already burdened Federal Board in expending time, energy and public funds.'

"The plan that emerged from the eight decisions made it clear that whenever federal jurisdiction exists under the statute and the interstate commerce clause of the Constitution the Board will exercise jurisdiction over:

"1. Instrumentalities and channels of interstate and foreign commerce (for example, radio systems).

"2. Public utility and transit systems.

"3. Establishments which operate as integral parts of a multistate enterprise (for example, chain stores, and branch divisions of national or interstate organizations).

"4. Enterprises which produce or handle goods destined for out-of-state shipment, or performing services outside a state, if the goods or services are valued at $25,000 a year.

"5. Enterprises which furnish services or materials necessary to the operation of enterprises falling into categories 1, 2 and 4 above, provided such goods or services are valued at $50,000 a year.

"6. Any other enterprise which has:

(a) a direct inflow of material valued at $500,000 a year; or

(b) an indirect inflow of material valued at $1,000,000 a year; or

(c) a combination inflow or outflow of goods which add up to at least a total of '100%' of the amounts required in items 4, 5, 6(a) and (b) above.

"7. Establishments substantially affecting national defense."

APPENDIX B.

N. L. R. B. Jurisdictional Standards—1954.

National Labor Relations Board

July 15, 1954 R-449

N. L. R. B. Announces New Standards for Exercise of Jurisdiction

"The National Labor Relations Board today [July 15, 1954] established new standards for determining whether the Board will take jurisdiction over cases involving retail stores, utility companies, transit systems, radio and television stations, newspapers, certain types of interstate companies, industrial service companies, and companies engaged in national defense work.

"The Board indicated that these changes will substantially complete the revision of its jurisdictional standards.

"The Board also announced that it will no longer take cases involving public restaurants.

"The Board has discretion to decide in which cases, of those affecting interstate commerce, it will exercise jurisdiction.

"The standards announced today are in addition to the new standards announced by the Board June 30, 1954. Those announced today also modify earlier standards adopted by the Board in October 1950. The changes announced today follow:

"A. For retail stores, the Board established two standards—one to govern in cases involving stores operating entirely within one state and the other to govern in cases involving chain stores operating in more than one state. The new standards are:

(1) A single independent retail store or a chain of stores operating entirely within one state will not come under the Board's jurisdiction unless the store involved in the case has

(a) purchases amounting to at least $1,000,000 a year coming to it directly from outside the state, or

(b) purchases of $2,000,000 a year coming to it indirectly from outside the state, or

(c) if the store ships $100,000 worth of merchandise into other states.

(2) A store which is part of a chain operating in more than one state will come under Board jurisdiction if

(a) the store meets either of the standards listed in (1) for intra-state stores, or

(b) the gross sales of the chain amount to $10,000,000 or more per year.

"(The former standards for stores were $500,000 a year direct purchases or $1,000,000 indirect purchases, or $25,000 a year sales made outside the state.)

"B. The Board announced that it would assert jurisdiction over radio and television stations only if their gross revenue amounts to at least $200,000 a year, and newspapers only if their gross revenue amounts to at least $500,000 a year.

"(The former standards placed no limit on jurisdiction of broadcasting stations or newspapers if their operations affected interstate commerce.)

"C. As to utility companies, such as power, gas, and water companies, and intrastate public transit systems, the Board announced that it would assert jurisdiction over such companies only if the company does a gross business of $3,000,000 a year or more.

"Interstate transit systems will come under Board jurisdiction if their gross revenue from interstate operations amounts to at least $100,000 a year. (The Board does not have jurisdiction of railroads and airlines.)

"(The Board formerly took jurisdiction of all utility and transit systems whose operations affected interstate commerce.)

"D. Companies engaged in business related to the national defense will come under Board jurisdiction when their business meets three tests:

(a) The goods or services supplied relate directly to the national defense.

(b) Such goods or services are furnished pursuant to a government contract.

(c) Value of these goods or services amounts to at least $100,000 a year.

"To come within the Board's jurisdiction, such companies must meet all three tests, the Board announced.

"(The Board formerly took jurisdiction of any company doing any work 'affecting' national defense.)

"E. Jurisdiction over multistate enterprises, other than retail and service establishments, will be governed by the following tests:

(1) To qualify, the plant involved must meet the outflow tests ($50,000 a year in direct outflow or $100,000 a year in goods furnished to an interstate company) or the inflow tests ($500,000 a year in purchases coming to it directly from outside the state where it is located or $1,000,000 a year coming to it indirectly from outside the state).

(2) If the plant involved does not meet these tests, jurisdiction will nevertheless be asserted if the multistate

enterprise, of which the plant is a part, has a total outflow of goods into interstate commerce totalling $250,000 a year, taking the outflow of all its plants together.

"F. Companies which supply services to interstate companies will come under the jurisdiction of the Board only if they meet the following tests:

(a) An independent establishment must furnish services amounting to at least $200,000 a year (formerly $50,000) to certain types of interstate companies.

(b) If the establishment is part of a multistate enterprise, jurisdiction will be asserted over any one establishment of the enterprise if the enterprise furnishes services amounting to $1,000,000 a year to interstate concerns.

"The Board announced that these changes in its jurisdictional standards will take effect immediately. The new standards will be applied to cases pending before the Board as well as to those filed hereafter.

"The changes indicated were made by majority vote in specific cases; the Board was not unanimous. Dissents will be included in the decisions as they issue.

"With today's new standards and the earlier amendments, the Board now will assert jurisdiction over the following types of companies:

"1. Instrumentalities and channels of commerce, interstate or foreign, except that:

Jurisdiction will be exercised over intrastate trucking companies and similar firms which are links in interstate commerce only if they do at least $100,000 worth of business annually for other concerns in categories numbered 1, 2, or 4.

Jurisdiction will be asserted over radio and television stations only if their gross annual revenue amounts to at least $200,000 and over newspapers only if their gross annual income amounts to at least $500,000.

"2. Public utility and transit systems:

(a) Local power, gas, and water utilities and local or intrastate public transit systems only if the company does a gross annual business of $3,000,000 or more.

(b) Public transit systems engaged in interstate commerce if the gross annual revenue from interstate operations amounts to at least $100,000.

"3. An establishment operating as an integral part of a multistate enterprise, other than a retail or service establishment, if one of the following tests is met:

(a) The plant involved has a direct outflow of goods into interstate commerce amounting to $50,000 a year (thus meeting the standard of category 4) or furnishes goods to the value of $100,000 a year to interstate concerns coming within categories 1, 2, or 4 of this list, or

(b) If the plant involved does not meet the separate plant tests listed in (a) above, jurisdiction will be asserted if the multistate enterprise, of which the plant is a part, has a total outflow of $250,000 a year into interstate commerce.

"Jurisdiction will not be exercised over an establishment solely because it is operating under a franchise from a national enterprise. Jurisdiction will be exercised over franchised establishments only if they satisfy some other standard in this plan.

"4. Enterprises other than retail stores, producing or handling goods destined for out-of-state shipment or performing services outside the state in which the firm is located, where such goods or services are valued at $50,000 a year.

"5. Enterprises furnishing goods or services that become a part of the stream of commerce amounting to $100,000 a year or more to concerns in categories 1, 2, or 4, except that:

Jurisdiction will not be exercised over enterprises supplying materials to other firms which do interstate business unless the materials themselves ultimately go outside the state.

"6. Enterprises furnishing services, other than those in category 5, amounting to $200,000 a year or more to concerns in categories 1, 2, 4, or if the establishment involved is part of a multistate chain, jurisdiction will be exercised if the chain furnishes services amounting to $1,000,000 or more per year to concerns in categories 1, 2, or 4, except that:

Jurisdiction will not be exercised over general or public office buildings merely because such buildings have tenants over which the Board takes jurisdiction.

"7. Enterprises other than retail establishments which have a direct inflow of goods or materials from out of state valued at $500,000 a year or more.

"8. Enterprises, other than retail establishments, with an indirect inflow of goods or materials valued at $1,000,000 a year or more.

"9. Retail stores:

(a) Independent retail stores, whether a single store or part of a chain operating entirely within a state, only if

(1) the store involved in the case has annual purchases amounting to at least $1,000,000 coming to it directly from outside the state, or

(2) the store involved has annual purchases of $2,000,000 coming to it indirectly from outside the state, or

(3) if the store ships $100,000 worth of merchandise into another state or states.

(b) Chains of retail stores, with stores in more than one state, only if

(1) the individual store involved meets either of the tests for intrastate stores, or

(2) the chain has gross annual sales totalling $10,000,00 or more.

"Jurisdiction will not be exercised over public restaurants regardless of source and volume of materials and regardless of whether the restaurant is part of a multi-state chain.

"10. Establishments affecting the national defense, where the goods or services furnished are directly related to national defense, and amount to at least $100,000 annually and are furnished pursuant to a government contract."